ANNUAL REPORT 1995 AND 1996

Workers' Compensation
Appeals Tribunal

Tribunal d'appel
des accidents du travail

ANNUAL REPORT
1995 AND 1996

Ontario

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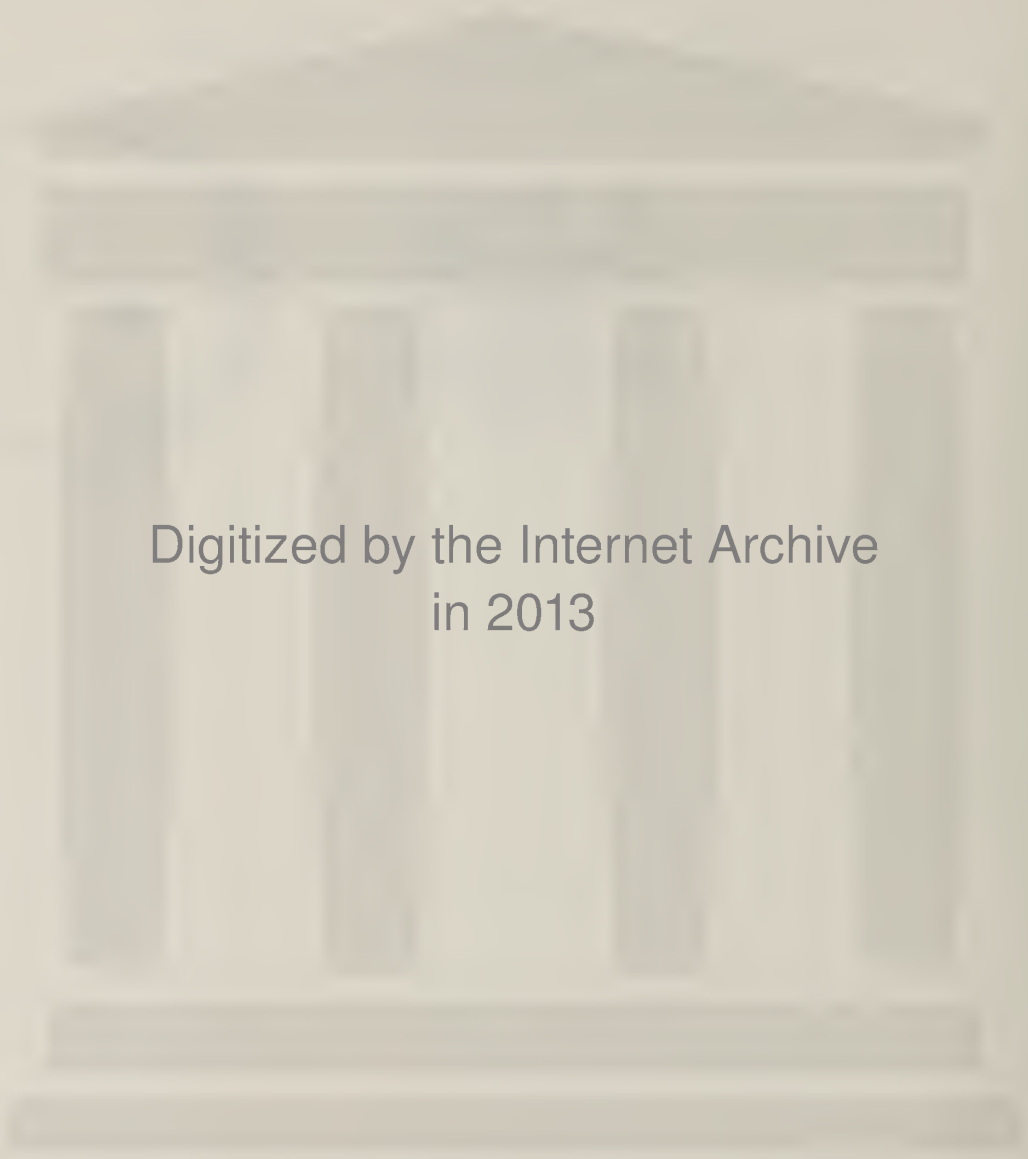

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Introduction

The Workers' Compensation Appeals Tribunal is a tripartite tribunal that hears and decides appeals from the decisions of the Workers' Compensation Board. It is a separate and self-contained adjudicative institution, independent of the Board.

This Report is the Tribunal Chair's and the Tribunal's annual report to the Minister of Labour and to the Tribunal's various constituencies. It describes the Tribunal's operational experience during the reporting period and covers matters which seem likely to be of special interest or concern to the Minister or to one or more of the Tribunal's constituencies. The reporting period for this particular report is not the usual one-year period but a two-year period, being the period from January 1, 1995, to December 31, 1996.

This is the second time in the Tribunal's history that the "annual" report has covered a two-year period. (The first two-year report was the Annual Report for 1992 and 1993.) The reason for combining the 1995 report with the 1996 report is as follows.

When the government changed in June 1995, the Honourable Cam Jackson was appointed as Minister Without Portfolio Responsible for Workers' Compensation Reform. Minister Jackson forthwith embarked on a review of the system. Following an initial fact-gathering process during the fall of 1995, a *Discussion Paper* on *New Directions for Workers' Compensation Reform* was published in January 1996. After a further period of consultation, Minister Jackson's final report was published in June 1996. The report recommended a number of fundamental reforms. In November 1996, Bill 99 was tabled in the Legislature.

Throughout this period, the Tribunal and its Chair were engaged in responding to the needs of the review process for information and comment respecting Tribunal matters. Thus, at the time when the 1995 Annual Report would traditionally have been written, the resources of the Tribunal were devoted to producing similar kinds of reports for the special purposes of the Jackson review. In these circumstances, it seemed reasonable to defer the 1995 report and issue a combined report in 1996.

The Appeals Tribunal's annual reports comprise, in effect, two reports: the Report of the Tribunal Chair and The Tribunal Report. The former reflects the personal observations and opinions of the Chair; the latter covers the Tribunal's activities and financial affairs, and any significant developments concerning its administrative policies and process.

Report of the Tribunal Chair

THE TRIBUNAL'S PERFORMANCE

In the Chair's opinion, the overall quality of the Tribunal's decisions remained excellent in 1995 and 1996, and the Tribunal's hearing procedures and processes continued to be fair and effective. The Tribunal's efforts to increase production levels in response to ongoing and significant caseload increases were also very successful. In 1995, the total number of dispositions reached 2,141 - 19% higher than the 1994 total - and in 1996 the total number of dispositions reached 2,512 - 40% over the 1994 figure.

It may be noted that these production increases were achieved with relatively small increases in the Tribunal's expenditure. The Tribunal's total annual expenditure for 1996 was 2.87% higher than the 1994 expenditure and only 8.6% more than the 1991 expenditure - 1991 being the bench-mark year when the upward trend in the caseload first appeared.

Regrettably, however, the production achievements were unable to match the increases in the incoming caseload. The intake increase in 1995 was relatively flat - approximately 6% above the 1994 figure, but in 1996 the total number of cases received reached 3,600 - 64% above the 1994 figure and 128% over the 1991 figure.

Therefore, despite what in other circumstances might be considered a substantial success in improving the Tribunal's overall efficiency, the increases in incoming caseload in fact significantly outpaced the increases in the Tribunal's production. In 1996, the Tribunal received, on average, 100 more cases per month than it was able to dispose of (300 new cases per month versus 200 dispositions). And, by the end of 1996, the Tribunal's total inventory had reached approximately 3,500 cases of which approximately 1,000 cases could be considered backlog.

Unfortunately, however, the growth in the *number* of new cases received each year is not by any means the whole story as far as the Tribunal's workload increase is concerned. As mentioned in previous Annual Reports, the Tribunal's increasing workload since 1991 has involved not only increases in the number of cases but also a significant increase in the average complexity of those cases.

The increase in the number of cases is the aspect of the workload increase that is most easily identified. However, the increase in the amount of work that is required on average for each case has been even more significant. One indicator of this is the proportion of the cases that fall within the "entitlement" category of cases. These are the core cases typically involving the resolution of serious and complex issues of fact and law. Since 1991, the proportion of entitlement cases to the total intake has increased dramatically - from 53% to 76% (from 834 cases in 1991 to 2,819 cases in 1996).

But even those figures deal only with the increase in the *number* of the more serious types of cases. What we have also been experiencing is that the average complexity of the cases that fall into this category has increased. This latter development is more difficult to substantiate with specific data but to those working in the field, not only at the Tribunal but elsewhere, it is well understood that the 1990 amendments to the legislation [*Workers' Compensation Amendment Act, 1989*, S.O. 1989. c. 47] have introduced a degree of complexity that is much greater than had previously been experienced. This translates at the Tribunal into longer hearings, more post-hearing investigations and submissions, more difficult decision-making and longer decisions.

As was to be expected, the growing disparity between what the Tribunal was able to produce and the cases it was receiving, and the resulting backlogs at various places in the Tribunal's processes, have led to substantial increases in the average turn-around times.

An area of the Tribunal's performance of particular concern since 1994 has been the number of cases in which the release of the decision following completion of the hearing is unreasonably delayed.

As indicated in the 1994 Annual Report, backlogged decision-making had been one of the significant consequences of the growth in the complexity of cases during 1993 and 1994. At the end of that reporting period, the Tribunal was in the final stages of developing a decision release policy that would ensure that decision-writing backlogs would not recur. The Tribunal's *Decision Release Policy* was published in February 1995. A copy of that policy may be found in Appendix A.

Resolving the backlogs and bringing the Tribunal's decision-release performance into compliance with the policy has proven to be more difficult than anticipated. The general overload context in which the Tribunal and its panel chairs and members have been working during this reporting period has been a pervasive hindrance to that effort. By the end of 1996, the number of unreleased decisions outside the policy had been reduced to a total of 41.

In the latter part of 1996, the Chair's Office introduced an automatic, multiple-step expediting process which should help in keeping the timeliness of decision writing under control.

TRIBUNAL RESTRUCTURING

The 1994 Annual Report described what it labelled the "1994 Restructuring Plan", which principally involved the introduction of a new case management focus led by a Case Management Team and the establishment of a dedicated Vocational Rehabilitation panel. See pages 4 to 6 of the 1994 Report. By the end of 1996, this was being referred to as Phase I of the Restructuring Plan.

The Phase I plan was implemented beginning in 1995. The case management strategy, as developed by the Case Management Team, involved

an assortment of new approaches to the effective management and resolution of cases, supervised and directed at the front end of the process by an experienced Panel of adjudicators. This was the first time that the perspective of experienced adjudicators had been brought to bear, at an operational level, at the beginning of the Tribunal's preparation processes.

The Case Management Team consisted of a standing, full-time tripartite Panel of the Tribunal assisted by a Tribunal Counsel Office lawyer. The Team, led by the Panel chair, had a broad mandate to review and restructure the Tribunal's pre-hearing case processing, with a view to finding innovative ways of resolving matters short of assigning it to a hearing panel for full hearing, and to ensuring that, where a hearing was unavoidable, cases would arrive at the hearing stage fully prepared for an efficient hearing.

To assist with an early analysis of a case's likely needs from a process point of view, the Case Management Team developed a new Appeal Application. The Appeal Application form was designed to provide, in an efficient and timely way, the information base which the early review process required. It asked the appellant to say at the outset precisely what WCB decision was being appealed, what, in particular, the appellant thought was wrong with that decision and what specific remedy he or she would be looking for if the appeal were successful.

Through a process of early review of all new cases, the Case Management Team pursued a number of particular goals. To begin with, it sought to identify cases which had arrived at the Tribunal prematurely (for instance, where there had been no final decision at the WCB so that the Tribunal did not have jurisdiction or where there were significant relevant issues that still had to be determined through the Board's adjudicative processes). Next, it attempted to ensure that only those cases which were ready for hearing were scheduled. For those cases which were not ready, the steps necessary to make them ready were identified and arrangements were made in conjunction with the parties to have those steps completed. It also tried to identify those cases that could be diverted from the Tribunal's mainstream processes to alternative, more expeditious hearing modes.

The Team developed, for example, a process where with the consent of the parties a case would be "heard" only on the basis of the written record and written submissions – the so-called "written hearing". By the end of the reporting period, the Tribunal was identifying about 15% of its incoming cases as suitable for a written hearing and obtaining the parties' consent to such a hearing in about 80% of those cases. Written hearings have been shown to be significantly more efficient than traditional oral hearings.

The Team also found it possible to categorize cases destined for an oral hearing by the expected length of the oral hearing, i.e., short-oral hearing cases or full-hearing cases. This led to efficiencies in the scheduling process and in the utilization of hearing rooms.

It is important to note that the concept of early review of cases in pursuit of many of these same goals has always been a function performed by the

Tribunal Counsel Office and that that function had been pursued over the years with considerable success. In recent years, we have traditionally been able to dispose of approximately 40% of our cases without the necessity of a hearing. However, the Phase I restructuring's involvement of senior adjudicators in a leadership role at the point of the initial case review brought a new perspective and a heightened authority to that review which energized the process and encouraged experimentation with new process concepts.

The second major feature of the Phase I Restructuring Plan was the creation of a specialized Vocational Rehabilitation Team (VRT). The Team was comprised of a standing, tripartite Panel of experienced, full-time adjudicators assisted by a lawyer and legal worker from the Tribunal Counsel Office. The Team's mandate was to experiment with innovative approaches to dealing with vocational rehabilitation appeals.

Appeals involving entitlement to vocational rehabilitation services and related issues were felt to be appropriate for an alternative approach for a number of reasons. Chief of these were the well understood benefits of early rehabilitation intervention, contrasted with the especially detrimental consequences, for the parties and the system, of unnecessary delays in the adjudication of such cases.

The Team approach to processing this type of appeal proved highly effective, both in the pre-hearing processing of appeals and at the hearing. The Panel's instructions to the TCO members of the Team were to do what seemed reasonable and appropriate in either resolving the appeal without a hearing or in preparing the case for hearing. In the course of this work, the TCO members of the Team were able to access the Panel for clarification or direction as necessary. Access through all stages of the pre-hearing process to the members of the hearing panel who will ultimately hear the appeal if it proceeds to a hearing, allowed the TCO members of the Team the confidence to explore more creative solutions with the parties, and to facilitate dispute resolutions, pre-hearing.

Cases for the VRT stream were first identified – initially by the Case Management Team and subsequently by the TCO Intake department – on the basis of the Appeal Application form and on the Team's or the department's assessment of the issues on appeal. These cases were then reviewed by the TCO members of the VR Team. If the case was selected, the parties to the appeal were notified by the TCO member assigned to the case. The parties were informed that with their consent, it might be possible to expedite the resolution of the appeal, either without a hearing or with a hearing.

A party to the appeal was not required to agree to any alternative approach during the pre-hearing phase of the appeal. Where there was no interest in exploring alternative, pre-hearing possibilities, the appeal was processed in the ordinary course and simply scheduled for a hearing before the VR Panel. As in any case at the Tribunal, parties were expected to respond to inquiries and communications in a timely fashion. Experience to date has been that most parties are very open to participating in alternative approaches in the pre-hearing processing of appeals.

For cases which went to a hearing, the Panel, licensed by its mandate to experiment with novel approaches to the hearing as well as the pre-hearing processes, developed a novel hearing process that it found particularly efficient and effective. This has been described in decisions of the Panel as a "fact finding approach". Under this approach, the initial questioning of the witnesses, including the worker, is conducted by the Panel itself (led by the Panel chair) rather than by the appellant or his or her representative. The parties or their representatives continue, of course, to be entitled to cross-question witnesses with opposing interests and may expand the focus of the questioning where they feel it necessary to do so. But with the Panel members leading the way in the questioning and thereby identifying at the outset the issues which, to their eye, the case record leaves in question, the efficient use of the hearing time is greatly enhanced.

This "fact finding approach" requires, of course, that the Panel members come to the hearing with an intimate understanding of the case based on a thorough reading of the case record. And that requirement makes the members' openness to re-thinking their understanding of the case in response to the in-hearing testimony and submissions doubly important. An especially firm commitment on the part of Panel members to that openness is an essential feature of this model.

In the course of the hearing, with the consent of the parties, the Panel would often put the "hearing" on hold while it initiated a general, free-flowing discussion of the nature of the appeal and the issues on appeal. In such discussions, it was common for the parties and the Panel to discover that the facts of the case or most of the facts were not in dispute and could be agreed upon. While there was less often consensus about the conclusions which should be drawn from those facts, even this sometimes developed.

In the course of these in-hearing "discussions" - and in the course of the pre-hearing exploration of the possibility of pre-hearing dispositions - the Panel and the lawyer and legal worker members of the Team often employed alternative dispute resolution (ADR) techniques. These included assisting the parties in distinguishing between their real *interests* in the appeal and their mere *positions* - to use the terminology of principled negotiation now so common in the ADR world.

These alternative hearing - and pre-hearing - techniques were only used with the consent of the parties. Where parties were not comfortable with any alternative techniques or approaches, a hearing was simply conducted in the traditional manner.

The VR Panel found that these alternative approaches to the in-hearing process often seemed to call naturally for oral rulings, either with respect to the appeal as a whole, or concerning sub-issues. However, all cases which went to hearing were concluded with a written, reasoned decision, even if an oral ruling had been given at the hearing.

By mid-1996, it had become clear that the developing caseload demands made further and more radical experimentation with ADR methods essential. We began, therefore, to apply the experience gained in the Phase I restructuring to the development of a Phase II Restructuring Plan. The Phase II plan received Tribunal approval in late November 1996, and will be implemented in 1997.

Phase II introduces a multi-stream processing concept. The streams are the "traditional hearing process stream", a "modified traditional hearing stream", an "alternative hearing stream" and an "early resolution stream".

The alternative hearing stream constitutes a continuation of the Phase I Vocational Rehabilitation Team's experimental processes, expanded to include a broader range of types of appeals. The early review functions of Phase I's Case Management Team have devolved to the Tribunal Counsel Office, and the Case Management Team has been discontinued, with the members of that team now being assigned the responsibility of developing and operating the new, early resolution stream. The early resolution stream involves a particularly innovative, entirely new ADR structure devoted to finding the appropriate basis for resolving a case without having to invoke the hearing process at all.

Details of the early resolution stream and other aspects of the Phase II plan may be seen in the Summary of the Chair's October 1996 Proposal and in the Tribunal's November 20, 1996, "Decision Document", both of which are available in the Tribunal Library.

CASELOAD – FUTURE PROSPECTS

Forecasting future incoming WCAT caseloads has always been an exercise fraught with uncertainty, and the difficulty is even more acute at the present time. A number of factors are at work.

In the first place, the WCB's decision-making process - the source of WCAT's caseload - continues in flux. The Board's internal appeals procedures have been dramatically restructured and, as of the end of the reporting period, further major adjustments to those changed procedures were in process. Also, during the reporting period, the Board's procedures were especially focused on the resolution of the large backlogs that had accumulated at the Board. The sharp increase in the Tribunal's incoming caseload in 1996 had been thought to be attributable in large measure to the Board's success in reducing those backlogs and thus to be a particularly unreliable indication of what we could expect in the future.

But, by the end of 1996, with its new appeals structures in full operation, the Board's Appeals Branch had found its production approximately balanced with its incoming caseload at the point where it was producing about 10,000 decisions a year, and living with a remaining backlog of about 4,300 unassigned cases which, with the currently available adjudicative resources, could not be further reduced.

The changes in the Board's internal appeals system resulted in a significant reduction in the volume of the appeals ("objections" in the Board's new parlance) being brought to that system. Less than half as many objections entered the Board's appeals system in 1996 than in 1994, the last full year of the old system. However, the move by the Board to a single level of appeal has meant that all appeal decisions produced are final decisions, appealable to WCAT. So, while substantially fewer objections are entering the Board's appeals system, the new system is producing a greater number of decisions that are eligible for appeal to WCAT. At the end of the reporting period, the Board was projecting that in 1997 it would again be producing approximately 10,000 appealable decisions.

During 1996, when the changes at the Board were finally being fully felt at the Tribunal, the Tribunal's intake each month averaged 40% of the Appeals Branch's output in that month. (This compares with the traditional ratio of 49% under the Board's previous appeals structure.) Based on that experience, it can be expected that a WCB output at the 10,000-decisions-a-year level will now produce about 4,000 WCAT appeals.

As this Report was being written (in January/February 1997), the WCB was contemplating increasing the Appeals Branch's production resources in 1997 to the level required to both deal with the incoming caseload and reduce by the end of the year the remaining unassigned case backlog to a working level of about 1,000 to 1,500 cases. If that strategy were adopted, we might anticipate that by the end of 1997, the Tribunal's incoming rate would reach 5,300 cases a year. Furthermore, if the ratio of WCAT intake to WCB output were not to hold at the 40% level, the caseload would be further impacted. If it were to return, for example, to the traditional 49% level, the Tribunal's rate of intake could be expected by the end of 1997 to reach 6,500 cases per year.

Please note that the reference here is to the *rate* of intake at the end of 1997. The effects of any extraordinary efforts by the Board to resolve its residual backlog would not likely be felt at the Tribunal until late in 1997 or early in 1998.

Fortunately, there is reason to believe that these particular possibilities are of a short-term nature. The Board's initiative in reducing its remaining backlog presents for the Tribunal a one-year caseload anomaly (but with its potential impact on the Tribunal extending into 1998). Also, the Board is committed to the improvement of the quality of its first-level decision-making, and the redesign of the Board's appeals structure has as one of its important goals a greater level of acceptability of the appeals outcomes. To the extent that these goals are achieved, the number of Appeals Branch decisions as well as the proportion of those decisions that are appealed will be reduced. However, these possibilities are not likely to be reflected in WCAT's incoming caseload until well into 1998. The Board's new strategic commitment to further significant reductions in the number of workers' compensation claims that it receives in the first instance may also, of course, be the precursor of a further reduction in WCAT business in the long term.

Bill 99 represents a number of different possibilities as far as the Appeals Tribunal's future caseload is concerned. Its proposed limitations on the Tribunal's jurisdiction and the removal of some categories of benefits may be expected to lead eventually to some reduction in the Tribunal's caseload. Experience with the 1990 legislative changes tells us, however, that the impact of these changes will not be likely to affect the Tribunal's caseload for at least a year or two or more after the Bill's proclamation date. And, at least in the shorter term, it seems likely that the Bill will produce further increases in the caseload.

For example, the new time limits on appeals and the proposed changes in benefit entitlements may be expected to lead to a short-term acceleration of the caseload as appellants seek to get in "under the wire". With a totally rewritten Act and a number of major substantive reforms, and with the new or rewritten Board policies that will have to follow, it is reasonable to expect a number of years in which the natural inclination to litigate novel interpretation issues will lead to increases in the level of litigation generally and probably to a correspondingly higher proportion of appeals. The introduction of limitation periods on claims and on appeals also introduces a brand new category of litigation, that is, litigation about the application of the limitation periods in the restriction of rights.

Furthermore, some of the provisions in Bill 99 appear to raise quite broad factual issues. See, for example, the issue as to whether an employer has "co-operated in the early and safe return to work of the worker". Under the current Act, the question of co-operation usually only involves consideration of the worker's co-operation with respect to a specific Board initiative. It seems likely that the adjudication of a serious dispute concerning what in an open-ended set of circumstances adds up to *co-operation* by an employer - or perhaps more importantly what in such circumstances adds up to a failure to *co-operate* - will often require fairly lengthy proceedings.

And then there is the advocacy resources factor. As has been noted in previous Annual Reports, the Tribunal's incoming caseload has traditionally been restricted by the funneling of appealable Board decisions through limited advocacy resources. In the past, much of the Board's output was effectively waylaid on its way to the Tribunal by the significant backlogs to be found in the Offices of the Worker Advisers, the legal aid clinics and the unions. Increasingly, however, this is becoming less of a factor. The recent explosion in the number of entrepreneurial "consultants" providing advocacy assistance to both workers and employers (see p. 12) means that limitations in the system's advocacy resources are fast disappearing. The funnel is rapidly becoming a chute.

It will be seen, therefore, that at the present time there is for a variety of reasons a potential for caseload increases in the latter part of 1997 or in 1998 that might take the Tribunal's annual intake to perhaps three times its 1995 intake and double the already unprecedented levels of 1996. Those would be, of course, intake levels with which this organization as presently constituted would be unable to cope without significant budget increases, a further - and more major - restructuring, and time to recruit and train the significant new adjudication resources that those levels of caseload would require.

PLANNING FOR THE FUTURE

As the Chair has indicated in previous reports, in his view there is a limit to the volume of cases that traditional final-level appeals structures can appropriately handle while remaining true to their mandate. He had previously offered the view that for WCAT that limit would be found at about the 3,000 cases per year level. With the increased emphasis on novel ADR techniques contemplated by the Phase II Restructuring Plan, he is now of the view that this limit might be pushed to 4,000 cases a year. Beyond that, however, major rethinking, possibly involving the introduction at WCAT of a two-tier appeals structure, will be necessary.

The obvious question is what, as of the end of the reporting period, the Tribunal is in fact proposing to do – in 1997 and 1998 – in light of these caseload potentials.

In the Tribunal's 1992 and 1993 Annual Report, in contemplating the prospects for large caseload increases at that time, the Chair had occasion to consider planning responses to projected caseload increases that would be appropriate in an environment of radical fiscal restraint where the projections were inherently uncertain both as to the timing and the dimensions of the increases. He offered the following view (at page 4):

> It remains a fact, however, that the ultimate actual effect of these upstream events on the Tribunal's caseload cannot be calculated with certainty. And, in this era of radical fiscal restraint, the Chair believes that addressing caseload problems that have actually materialized is the only feasible strategy. This strategy implicitly contemplates periods of transition when the Tribunal's capacity to cope will, in point of fact, be outrun by the rapidly developing caseload increases. And, during these periods of adjusting production capacity to new realities, case delays may be experienced that would otherwise be unacceptable. However, it seems to the Chair that this is an unavoidable cost of prudent fiscal management in an era of restraint that cannot be avoided.

This strategy of planning only for caseloads that have actually arrived continues, in the Chair's view, to be a valid and necessary approach at this time.

The Tribunal's response to the developing caseload during 1995 and 1996 was understandably somewhat hampered by the government's fundamental review of the workers' compensation system during this period – a review in which the continued need for the Appeals Tribunal was one of the questions in issue. At the beginning of 1995, it had seemed clear that the Tribunal was in the midst of another leap in the caseload. And, with the goal of bringing its production capacity up to a level of 3,000 cases per year, the Tribunal had secured approval from the previous government for a significant budget increase – a $2.3 million increase (about 19% over the 1994 budget). The principal feature of the plan underlying this budget was the support of the Phase I Restructuring Plan with the addition of three new, full-time hearing panels and associated support staff and facilities.

The process of developing agreement on the 1995 budget proposal meant that approval was not received until the end of February. By then, the trend in the caseload increase had inexplicably begun to flatten (the caseload expected in 1995, in fact, finally arrived in 1996) and the Tribunal was also beginning to see the potential for gains in the Phase I Restructuring Plan. Accordingly, the addition of the new full-time panels was delayed and work was begun on the bolstering of the part-time vice-chair resource – a more flexible response in a world of uncertain intake projections.

The result was that in June, when the government announced its intentions concerning the system review, the bulk of the 1995 budget increase had not been committed. And, of course, at that point it became impossible – as well as not sensible – to implement the planned expansion. Apart from anything else, the recruitment of new full-time vice-chairs and members was not feasible from a practical point of view while the Tribunal's continued existence remained an open question.

Accordingly, from that point through to the end of 1996 we operated on a tacit understanding that Tribunal expenditures would be held at the status quo level pending completion of the review process. Vacancies that arose in the full-time vice-chair positions (two by the end of the reporting period) were not filled. However, in January 1996, the government accepted the Chair's recommendation concerning the appointment of five new part-time vice-chairs. And beginning in 1996, we increased the level of employment of the part-time vice-chair roster. However, the per diem fees and travel costs associated with that increase were covered by the transfer of money from other budget lines. The total expenditure in 1995 was ultimately held to approximately $12.3 million and in 1996 to $11.7 million.

With the tabling of Bill 99 in late November 1996, the uncertainty surrounding the Tribunal's future was put to rest, and plans for the future became an immediate priority. By the end of the reporting period (in fact on January 15, 1997), the Tribunal proposed to the Minister a detailed operational plan for 1997 and 1998 which reflected the Phase II Restructuring and was based on the assumption that the incoming caseload during this two-year period would average what had been in fact received in 1996, that is, 300 cases per month. The plan's goal was to deal with that increased intake while resolving the Tribunal's backlog by the end of 1998. This would require increasing the Tribunal's production rate to virtually double its 1996 production rate (to 390 per month) and accomplishing that by November 1997.

The increase in expenditures proposed for 1997 was 11.4% over the 1996 expenditures and 7.8% below the 1995 budget. The plan projected a decrease in budget in 1998 (in 1997 dollars) when the full savings associated with Bill 99's provisions concerning single-person adjudication at the Tribunal become available, and a further decrease in 1999 when the backlog-fighting component of the plan comes to an end. The projected 1999 budget, supporting a projected production of 300 dispositions a month, was 1% higher than the 1996 actual expenditures which had produced 200 dispositions a month.

The operational plan for 1997 is ambitious. It relies heavily on the prospects, which the Chair believes to be inherent in the new four-stream process, of disposing of a much higher proportion of cases without a hearing, and on a number of uncertain operating assumptions, not the least of which is, of course, the assumption about the future level of incoming cases. In the Chair's opinion, however, it was a reasonable response to the caseload situation as it stood at the end of the reporting period, and one which, in any event, stretched the Tribunal's capacity for rational growth to the limit. Only time will tell whether it is realistic and/or sufficient.

REVIEW OF THE WORKERS' COMPENSATION SYSTEM DURING 1995 – 1996

A Royal Commission on Workers' Compensation chaired by Lynn Williams was appointed in November 1994. The Tribunal's briefing of the Royal Commission concerning the Tribunal's role in the system took place in January 1995. When a new government was elected in June 1995, the Royal Commission was disbanded and the Honourable Cam Jackson was appointed Minister Without Portfolio Responsible for Workers' Compensation Reform. Minister Jackson's first step was to initiate a full review of the workers' compensation system. One of the questions on the review's agenda of issues was whether there continued to be a need for an external appeals tribunal.

During the Minister's initial fact-gathering process in the fall of 1995, the Minister invited the Tribunal to brief him and his staff concerning the Tribunal and its role as the system's final-level appeal structure. The Chair and Alternate Chair met with the Minister and his staff in October. In December 1995, as a follow-up to that meeting, the Chair filed with the Minister a set of "Notes". The focus of the *Notes* was not WCAT per se but, rather, any final-level appeals structure in a workers' compensation system. The *Notes* were intended to speak to the nature of the system context within which any final-level appeal structure must fit and to address the principles and practical considerations which, in the Chair's view, were important to the design of any such structure.

In January 1996, Minister Jackson published a *Discussion Paper* on *New Directions for Workers' Compensation Reform*. The *Discussion Paper* was intended to provide a focus for further discussion of what the Minister saw to be the fundamental problems facing the system and the possible solutions to those problems. The *Discussion Paper* explicitly asked the question (at page 27): "Is the continued existence of an external appeals tribunal justifiable?" If it is, should its jurisdiction be altered?

The Minister had invited the Tribunal to comment on the *Discussion Paper* and in March 1996, the Chair filed a "Comment" with Minister Jackson and with the Minister of Labour.

After a further period of consultation, Minister Jackson's final report was published in June 1996.

Following the release of Minister Jackson's final report, responsibility for the development of legislation fell to the Minister of Labour, and in November 1996, Bill 99 received first reading.

As it relates to the Appeals Tribunal, Bill 99 would, amongst other things: continue WCAT under a new name – *Workplace Safety and Insurance Appeals Tribunal*; require it to apply WCB policies identified by the WCB as applicable; direct it to release decisions within 120 days of the completion of a hearing; and establish that appeals would be decided by single adjudicators except in cases where the Tribunal Chair considered the circumstances "appropriate" for a three-person panel. The Act would continue provision for the appointment of members representative of workers and employers in numbers to be determined by the Lieutenant Governor in Council. It also would establish a six-month time limit on bringing appeals to the Tribunal.

For readers interested in following the course of the discussion concerning the Tribunal and its appropriate role in the system during the Jackson review process, the Chair's *Notes* and the Chair's *Comment,* as well as Minister Jackson's *Discussion Paper* and his final report, are all available in the WCAT Library.

TERMINATION OF THE CHAIR'S EX OFFICIO POSITION ON THE WCB BOARD OF DIRECTORS

Since the Tribunal's inception in 1985, the *Workers' Compensation Act* had specified that the Chair of the Appeals Tribunal was a non-voting member of the WCB board of directors. See section 56(2) of the pre-1995 Act. An analysis of the role and its systemic implications as experienced and perceived by the current Chair may be found in WCAT's *Second Report, 1986-1987,* at pages 12 to 14.

Effective November 1, 1995, amendments to the provisions of the Act dealing with the Board's governance structure eliminated the Chair's position as an *ex officio* member of the board of directors. See S.O. 1995, c. 5, s. 6(1).

THE BURGEONING CONSULTANT INDUSTRY AND THE NEED FOR A CODE OF CONDUCT

Representation of injured workers and employers by private enterprise consultants has grown dramatically. In 1996, 27% of all represented workers were represented by consultants. This compares to 6% in 1991 and 12% in 1994.

The quality of representation provided by consultants is often very acceptable. However, as the number of individuals involved in the field grows, Tribunal hearing panels are increasingly encountering representatives who either contribute nothing of value to the process or who become a positive hindrance to a panel's hearing of the case. The more flagrant examples of this are increasingly being flagged by the panels through explicit criticism in their written decisions.

The experience of bad representation is not confined to consultants (nor is it confined to those representing injured workers). But one redeeming feature of other categories of representatives is that they inevitably belong to organizations that have an interest in and some capacity for holding them accountable for reasonable competence and care in their work. Even sole-practitioner lawyers must answer at some level to the Law Society.

Generally speaking, consultants do not operate under any such restraints. When panels are confronted with a representative who demonstrates ignorance of the law, has done no preparation concerning the evidence or facts, and who contributes nothing to the process but posturing, bombast and delay, when, in short, panel members realize that they are witnessing what amounts to a fraud on both the system and the client, and they are the only ones in a position to evaluate that conduct, what is the panel to do? Going public with criticism in the written decision may help to release the panel's frustration but it is only possible where the representative's client is successful in the appeal - criticizing a losing party's representative in the decision will not generally be appropriate - and such criticism can be safely ignored by a "winning" representative.

It is also to be noted that because of the Tribunal panels' inquisitorial responsibility to decide cases on their real merits and justice, bad representatives will often be able to claim "wins" when they have done nothing but obstruct or delay the outcome. Such representatives can stay in the business and prosper on the basis of the panels doing their work for them.

In these circumstances, and in the absence of other viable remedies, or, it seems, of any prospect of the regulation of so-called "paralegals", the Tribunal is now intent on the development of a Tribunal code of minimum conduct for representatives. We are also contemplating making reasonable conformance with that code a condition of continued participation in the Tribunal's processes, either in a particular proceeding or, where a pattern of non-conformance develops, generally.

THE CROSS-APPOINTMENTS PILOT PROJECT

The cross-appointments pilot project was a joint initiative on the part of the Ministry of Labour, the Office of Adjudication, the Pay Equity Hearings Tribunal and the Workers' Compensation Appeals Tribunal.

The nature of the experience with the cross-appointments may be seen in the three Chairs' final report to the Minister of Labour, attached as Appendix B.

The final report recommends the extension of the project for another term. But, at the end of the reporting period it is understood that the matter is on hold pending the restructuring or re-organization of the agencies in question.

COLLECTIVE BARGAINING AT THE TRIBUNAL

Tribunal staff are not members of the Ontario Public Service but are Crown employees employed directly by the Tribunal. Bargaining Unit staff are represented by OPSEU local 527, certified in October 1992.

In 1996, the Tribunal and its Bargaining Unit became subject to their first collective bargaining agreement. This resulted from an Arbitrator's Award issued June 7, 1996. The award was issued pursuant to a first contract arbitration which was applied for by the employer in August 1995. The Tribunal's application for first contract arbitration had followed extensive but unsuccessful efforts at reaching a mutual final agreement. These efforts included meetings with a Conciliation Officer appointed by the Minister of Labour under section 16 of the *Labour Relations Act* in March and April 1995, and a meeting with a mediator appointed under section 17 on May 30, 1995. The nature of the issues referred to arbitration and the Arbitration Board's determination of those issues may be seen in the following paragraphs from the Board's award:

> The real issue between the parties is what to do with respect to the wages and classification system for the purposes of this first collective agreement. The Chair of the Tribunal under a Memorandum of Understanding with the Ministry of Labour hitherto has had the authority to set wages, etc. for the Tribunal's staff, and has exercised that discretion by allowing the staff to enjoy the same wage and classification grid as the main Civil Service group.
>
> The board awards continuation of the OPS rates and classification system as offered by the Tribunal. While we acknowledge the argument of the Union that this kind of direct linkage effectively removes from the Local the power to negotiate these matters on their own, that to us is once again an appropriate consequence of the unit having only too gladly hitched its star to the OPS wagon for essentially all other purposes.

HIGHLIGHTS OF THE 1995 – 1996 CASE ISSUES

This section of the Chair's report highlights the legal, factual and medical issues dealt with by Tribunal decisions during the reporting period. Unfortunately, it is never possible to do more than take note of a limited selection of issues that seem likely to be of special interest. The topics are presented in no particular order of importance. Some have been dealt with in previous annual reports, while others are new.

During this reporting period, the Workers' *Compensation Act*[1] was amended by Bill 15[2] and Bill 165.[3] The Tribunal had only one occasion to consider these amendments.[4] However, in this reporting period, the Tribunal issued a number of cases dealing with the new compensation scheme introduced earlier by Bill 162.[5] For ease of reference, the Bill 162 cases have been grouped at the beginning of the case highlights.

The version of the *Workers' Compensation Act* incorporating the changes introduced by Bill 162 will be called the "current Act". The earlier versions of the *Workers' Compensation Act*, which continue to apply to accidents occurring before 1985 and 1990, are referred to in the current Act as the "pre-1985 Act" and the "pre-1989 Act",[6] and will be referred to here in the same way.

Re-employment

Section 54 of the current Act creates a new obligation for specified employers to offer to re-employ injured workers. The Board has a discretion to impose a penalty on the employer and/or to award benefits to a worker for up to one year if the employer breaches its obligations.

The three previous Annual Reports noted that two early Tribunal cases had held that the employer's obligation to offer to re-employ did not arise until the employer had received a valid notice of fitness from the Board. See *Decision No. 372/91* (1991), 19 W.C.A.T.R. 317, and *Decision No. 605/91* (1991), 21 W.C.A.T.R. 131. The Board provided general submissions on this interpretation and *Annual Report 1992 and 1993* and *Annual Report 1994* recorded a trend in more recent cases to interpret the current Act as creating a general obligation to re-employ. This now seems to be the accepted approach at the Tribunal. During this reporting period, no decisions issued which took the earlier view.

An area of continuing difference between the Board and the Tribunal during this reporting period was the test an employer must meet to show that it has discharged its obligations under section 54. Board policy is that an employer must

1 R.S.O. 1990, c. W.11 as amended.

2 *Workers' Compensation and Occupational Health and Safety Amendment Act, 1995*, S.O. 1995, c. 5: sections 6(1), (3), 8 and 9 deemed in force November 1, 1995; sections 1-5, 10, 12-27 in force December 14, 1995; and sections 6(2), 7 and 11 proclaimed in force July 17, 1996.

3 *Workers' Compensation and Occupational Health and Safety Amendment Act, 1994*, S.O. 1994, c. 24: sections proclaimed in force between January 1, 1995, and April 10, 1995; s. 25(2) to come into force on proclamation.

4 See *Decision No. 213/93* (1995), 34 W.C.A.T.R. 84, where a panel considered the implications of the "purposes" clause introduced by Bill 165.

5 *Workers' Compensation Amendment Act, 1989*, S.O. 1989, c. 47; in force, except sections 1-27 and 29, July 26, 1989, sections 1-27 and 29 proclaimed in force January 2, 1990.

6 Pursuant to section 144 of the current Act, the "pre-1985 Act" is defined as the Act as it read on March 31, 1985, and it applies to accidents occurring before April 1, 1985. The "pre-1989 Act" means the Act as it read immediately before July 26, 1989, and it applies to accidents occurring on or after April 1, 1985, and before January 2, 1990.

be able to demonstrate "just cause" for dismissal before it can terminate an injured worker without being seen to breach its re-employment obligation.

Tribunal cases have held that the intent of section 54 is to place a worker in the position the worker would have been in if the workplace accident had not occurred. The test generally used by Tribunal panels is whether the employer displayed anti-injured-worker animus, that is, whether the reasons for termination related to the workplace injury or were an attempt to avoid section 54. For example, where a truck driver was involved in a third preventable driving accident, which resulted in a compensable injury, and was terminated on his return to work, it was held in *Decision No. 911/94* (1995), 37 W.C.A.T.R. 138, that the employer had not violated section 54. The majority in that decision reasoned that the Act requires the employer to reinstate the worker to the position which he held on the date of injury, subject to the usual terms, conditions and policies. The worker was properly terminated under the employer's general policy of terminating drivers after three preventable driving accidents. The majority noted that the employer must produce convincing evidence that its decision neither was influenced by the compensable injury nor constituted an attempt to avoid its section 54 obligations.

Similarly, section 54 was held not to have been breached where an injured worker who was employed under a term contract did not have his contract renewed because the employer had made a good faith decision to change its workforce. See *Decision No. 944/95* (January 12, 1996). However, section 54 may be held to be breached even where the employer has valid economic reasons for laying off workers if the manner in which the lay-off is implemented discriminates against an injured worker on the grounds of the worker's compensable injury. See *Decision No. 711/94* (1995), 34 W.C.A.T.R. 235. Similarly, an employer may be in breach where the work offered is not *comparable* to the pre-injury job. A job offer is not comparable where it does not incorporate arrangements regarding the worker's hours of work which had been specifically negotiated prior to the injury. See *Decision No. 502/95* (September 13, 1995).

A few re-employment cases have raised the possibility that section 54 appeals may more readily lend themselves to settlement than other cases. Under section 18 of the current Act, it is not possible for a worker to agree with an employer to waive or forego any benefits under the Act. However, in two re-employment cases issued during the reporting period, Panels approved a settlement between the parties. In *Decision No. 699/94* (1995), 35 W.C.A.T.R. 130, it was held that section 18 should not be applied in a mechanical way to prevent a well-informed settlement which met the parties' needs and systemic requirements, including the need that the Accident Fund not be negatively affected. In *Decision No. 908/94* (1995), 35 W.C.A.T.R. 189, the parties agreed that the re-employment obligation had been breached but jointly submitted that the penalty should be waived. The Panel noted that section 54(13)(a) creates a discretionary penalty intended to further rehabilitation and that a waiver of a penalty does not constitute a waiver of benefits. Other factors considered were whether there was any systemic benefit or benefit to the parties in having timely closure, whether a penalty was reasonable in the circumstances and whether there was any abuse of the workers' compensation system.

A variety of other issues under section 54 have arisen during this reporting period, including the standard of review to be applied when the Board makes a determination outside of the three-month time limit in section 54(12) (*Decision No. 56/95* (1995), 35 W.C.A.T.R. 137), the extent to which discretionary benefits under section 54(13)(b) can be tailored to meet the circumstances of the case (*Decision No. 851/93* (1995), 36 W.C.A.T.R. 70) and the interaction between temporary benefits under section 37 and discretionary benefits under section 54(13)(b) (*Decision No. 337/95* (1995), 36 W.C.A.T.R. 193).

Penalties under the Re-employment Provisions

Section 54(13) creates a discretionary penalty for breach of an employer's obligations under section 54. The maximum amount of the penalty is tied to the amount of the worker's net average earnings for the year preceding the injury; thus, the dollar amount of the penalty is variable and, for injured workers with high-paying jobs, can be quite significant.

Board policy is to impose the maximum penalty as a general rule unless the employer cannot hire the worker for reasons beyond its control (for example, a market collapse) or the employer subsequently rehires the worker. Tribunal decisions have continued the trend noted in the two previous Annual Reports of taking a more flexible approach to penalty assessments. For example, the penalty was waived in *Decision No. 502/95* where the Panel found that the employer had made a substantial effort to re-employ the worker and had not acted in bad faith or with anti-injured-worker animus. The employer had committed a technical breach as it did not fully understand the consequences of changing the terms of the injured worker's employment.

Section 54 creates more than one obligation, and *Decision No. 507/92* (1995), 35 W.C.A.T.R. 17, considered the question of whether two separate penalties could be imposed where the employer had committed two breaches. The Panel found that a plain reading of section 54(13)(b) suggested that only one penalty should be imposed and, given the substantial nature of the maximum penalty, a single penalty would fulfil the Act's purposes of furthering re-employment and deterring violations. Since the amount of the penalty was discretionary, the adjudicator could consider the number of breaches in setting the amount.

Future Economic Loss Awards and Supplements

The current Act contains a new dual-award structure for compensating long-term disabilities. Section 43 provides for compensation for future economic loss (FEL) where the worker suffers injury resulting in temporary disability for 12 continuous months or permanent impairment. Section 42 of the Act (discussed below) provides for compensation for non-economic loss (NEL).

Section 43 is a complicated provision which not only introduces a new approach to compensation, but creates its own review process and time limits for when the original FEL decision (D1) and FEL reviews (R1 and R2) should be undertaken. Section 43 is also closely tied to the new right to vocational

rehabilitation in section 53, since the FEL award requires consideration of a number of factors including a worker's vocational rehabilitation prospects and what the worker is likely to earn in suitable and available employment. Section 43(9) creates a FEL supplement which is available in certain circumstances where a worker is co-operating in a Board-authorized vocational or medical rehabilitation program. In light of the possibility of a FEL supplement, the Board has developed a system of FEL "sustainability awards". A worker who is back at work and suffering no wage loss may receive a nominal FEL award so that if the work arrangement ends, the Board can provide rehabilitation and a FEL supplement pursuant to section 43(9).

Tribunal decisions often involve retroactive adjudication where a panel must go back in time and decide what the Board should have done in the first instance in order to determine past and current entitlement. This is a particular challenge in vocational rehabilitation appeals, since it is never possible to implement the vocational rehabilitation or the modified work at the time it should have been provided. A further complication in FEL cases, is that not only must the panel decide what vocational rehabilitation or modified job would have been appropriate and then project from there, but do so in light of the time lines provided in section 43. This is discussed in *Decision No. 524/94* (1995), 34 W.C.A.T.R. 164, which held that since it is not possible to effect rehabilitation retroactively, FEL benefits must be based on what the worker was likely to earn at the time without rehabilitation or a job offer, when these had not been available to the worker.

Annual Report 1994 mentioned that *Decision No. 776/93I* (1994), 32 W.C.A.T.R. 114, contained the most thorough discussion of FEL provisions, but that a final decision was deferred pending additional submissions from the Board, the parties and Tribunal counsel. Submissions were received during this reporting period and a final decision is expected in the upcoming reporting period. Meanwhile, a number of Tribunal decisions have considered aspects of the issues flagged by *Decision No. 776/93I.*

One difficult FEL issue is the effect of the time limits in section 43(10). The Act states that "[w]here possible" the Board shall make the original FEL determination: in the 12th consecutive month during which the worker is temporarily disabled; or within one year after notice of the accident if during that year the Board determines that the worker is permanently impaired; or within 18 months after notice of the accident, if the worker's medical condition precludes an earlier determination. Under section 43(12), the Board may extend the time limits for "a worker who is not receiving compensation under this Act and whose entitlement to compensation is in dispute". Section 43(13) provides that "[w]here possible" the Board shall review the initial FEL determination in the 24th month and the 60th month after the initial determination.

Decision No. 627/95 (1995), 36 W.C.A.T.R. 268, interpreted section 43(10) as providing for a strict time-driven process which requires the Board to give a prompt best guess as to the likely future consequences of a workplace injury which is reviewed at the two-year and five-year points. "Where possible" refers only to exceptional circumstances or minor breaches of the time limits. *Decisions No. 624/94* (1995), 34 W.C.A.T.R. 223, and *436/95* (1995), 36 W.C.A.T.R. 242, took a

similar approach, finding that the FEL assessments should have been done at the 18-month point. *Decision No. 699/95* (January 22, 1996), indicated some flexibility in the time limits, and found that although the FEL assessment should have been made after one year or 18 months at the latest, there was no reason to adjust the effective date of the FEL award where the assessment was only somewhat out of time and the delay did not have a significant impact on the facts of the case. *Decision No. 55/95* (1995), 34 W.C.A.T.R. 265, dealt with the case of an amputation, a permanent injury that did not result in 12 months of continuous temporary benefits, and found that the FEL assessment should have taken place when temporary benefits ceased. *Decision No. 730/94* (April 26, 1995) held that section 43(12), which allows for an extension of time limits where there is a dispute, only applies where the dispute relates to initial entitlement to benefits.

Tribunal cases have been consistent in holding that once the FEL date is determined, the worker's entitlement depends on the facts as they existed at the FEL date. The Act requires a prospective determination of the worker's likely future earnings loss, given the nature of the impairment and the worker's circumstances as they existed on D1. New evidence which is relevant to the facts at the FEL date may be considered, but evidence of subsequent developments should be assessed at the appropriate review date.

Tribunal decisions have also been consistent in holding that more than the worker's actual loss of earnings at D1 must be considered in making a FEL determination. Sections 43(7) and 63 of the Act specify a number of considerations, including the worker's personal vocational characteristics and prospects for successful medical and vocational rehabilitation. While the possibility of re-employment with the accident employer is an important factor where a job offer has been made, it is also necessary to consider whether the job was realistic and sustainable over a period of time. *Decision No. 829/94* (1995), 33 W.C.A.T.R. 229, applied the reasoning in *Decision No. 776/93I*, that a "concocted job", which is not a real job which the worker could be expected to sustain, does not constitute suitable and available employment under section 43.

This reporting period also saw two decisions dealing with section 43(8), which provides that a worker may elect to receive a FEL benefit equivalent to the old age security pension instead of the normal FEL amount if the worker is at least 55 years of age, has not returned to work and is unlikely to benefit from vocational rehabilitation. See *Decisions No. 476/94I* (1995), 33 W.C.A.T.R. 125, and *1088/96* (1996), 40 W.C.A.T.R. 269.

Non-economic Loss Awards

As mentioned above, non-economic loss (NEL) awards are the second part of the compensation package which replaces the old pension system. In the past, workers were not entitled to compensation for non-economic damages such as loss of enjoyment of life. While the non-economic loss award is intended to compensate for more intangible losses, the statute provides for a very technical assessment process and the worker must have reached "maximum medical rehabilitation". Section 42(2) contains a formula for calculating the NEL award. The section also provides for medical assessments by doctors, a system

for challenging these assessments and a separate NEL review process. Section 42(5) provides that the Board shall make the NEL determination in accordance with the prescribed rating schedule and having regard to the NEL medical assessments. The America Medical Association Guides (AMA Guides) are prescribed by regulation as the rating schedule.

During the previous reporting period, the Tribunal had only one occasion to consider section 42 in *Decision No. 269/93* (1994), 30 W.C.A.T.R. 123. One of *Decision No. 269/93*'s holdings - that the Board does not have any discretion to deviate from the applicable rating schedule where the impairment is specifically listed in the AMA Guides - was considered in *Decision No. 122/96* (1996), 38 W.C.A.T.R. 205. This decision found that under section 42, the Board continues to enjoy the right to exercise some reasonable judgment in applying the AMA Guides and in obtaining accurate assessments of the worker's condition when determining impairment. It is not always inappropriate to assess a degree of impairment not expressly provided for in the AMA Guides. *Decision No. 122/96* also held that a worker was not entitled to a multiple factor where he had a pre-1989 injury, governed by the old pension system, and an injury governed by the new compensation system.

Several Tribunal decisions have emphasized that it is necessary to take into account the likely future consequences of a compensable injury in doing a NEL assessment. However, future significant deterioration is most appropriately considered by an application under section 42(21). See *Decisions No. 584/96* (August 1, 1996), and *566/96* (1996), 40 W.C.A.T.R. 193.

A few Tribunal cases have noted the Board policy of deducting a pre-1989 pension from a current permanent impairment rating in determining entitlement to a NEL award when both awards are for injuries to the same body part. However, none of these decisions had occasion to consider this policy. In *Decision No. 883/95* (1996), 39 W.C.A.T.R. 161, the Panel found that where there was a reasonable basis to question the accuracy of the pre-1989 award, the Panel should look behind the mechanical application of the Board policy and decide whether there was any residual impairment due to the 1990 accident. *Decision No. 764/96I* (1996), 40 W.C.A.T.R. 212, noted that NEL assessments are very technical and it is difficult for a worker to predict what a NEL award will be and to make an informed decision to request a second NEL assessment. The Panel directed a new NEL assessment where the worker did not have a full opportunity to object due to lack of information. *Decision No. 816/96* (1995), 40 W.C.A.T.R. 226, found that section 42 requires a NEL assessment by an independent examiner and that it is important not to blur the distinction between the role of the medical assessor and the Board adjudicator. When the Board has a fundamental concern about a NEL assessment, its remedy is to require a second assessment under section 42(13). And see *Decision No. 2/96* (1996), 40 W.C.A.T.R. 104, on the use of the AMA Guides and rounding assessment ratings.

Transitional Supplements

Although Bill 162 primarily dealt with accidents occurring after 1990, it also created a system of supplements for workers receiving pensions under the pre-1985 and pre-1989 Acts. This scheme is found in section 147 of the current Act. Since this section is in Part III of the Act, entitled "Transitional Provisions", section 147 supplements are often referred to as transitional supplements.

The current Act placed a new statutory obligation on the Board to offer rehabilitation services to workers with post-1989 injuries and tied the level of FEL benefits to the worker's prospects for successful medical and vocational rehabilitation. Section 147 creates a somewhat similar scheme with respect to vocational rehabilitation for workers receiving pensions under the earlier Acts.

Section 147(2) provides that the Board shall pay a supplement to a worker who, in the opinion of the Board, is likely to benefit from a vocational rehabilitation program which could help increase the worker's earning capacity so that it approximates the pre-injury earnings. Section 147(4) provides that the Board shall give a supplement to a worker who, in the Board's opinion, is not likely to benefit from a vocational rehabilitation program or whose earning capacity after such a program would not be increased to a level where it approximated the pre-injury earnings. The section 147(2) supplement is paid only while the worker is participating in a Board-approved program. A section 147(4) supplement continues until the worker becomes eligible for old age security benefits, and the amount is limited to the amount of a full, monthly old age security pension.

As recorded in the *Annual Report 1994, Decision No. 689/91* (1994), 30 W.C.A.T.R. 110, found that there was no statutory requirement to consider the reason for a worker's lack of vocational rehabilitation potential in determining entitlement to a section 147(4) supplement. Subsequently, the Board made general submissions on the interpretation of section 147(4) explaining the Board's policy that entitlement to a section 147(4)(a) supplement depended on the worker's wage loss being at least partially related to a compensable injury. These submissions came before the Panel in *Decision No. 213/93* (1995), 34 W.C.A.T.R. 84. That Panel noted that *Decision No. 689/91* had not expressly commented on the Board policy that required *a wage loss* to be at least partially related to a compensable injury since it was dealing with a lack of vocational rehabilitation potential. Since, in their case, the compensable injury had made a significant contribution to the wage loss, it was not necessary for *Decision No. 213/93* to decide on the Board's submissions. And see *Decisions No. 812/94* (1995), 33 W.C.A.T.R. 212, and *438/95I* (1996), 39 W.C.A.T.R. 152, which found that, even if the wage loss must be at least partially related to the compensable disability to qualify for a section 147(4) supplement, that requirement was met on the facts of those cases.

Co-operation is often a central question in cases involving vocational rehabilitation. While section 147(2) does not specifically refer to co-operation, non-co-operation does raise the question of whether a worker is likely to benefit from a vocational rehabilitation program. Thus, *Decision No. 740/92* (1995), 34 W.C.A.T.R. 67, denied a supplement under section 147(2) where a worker had previously not co-operated in a suitable training program due to lack of attendance.

Other interesting issues involving section 147 supplements included: whether payment of such supplements is excepted from the Ontario *Human Rights Code* because the payments are periodic (*Decision No. 468/94* (1995), 35 W.C.A.T.R. 101); the relationship between CPP payments and section 147 supplements (*Decision No. 220/95* (1995), 34 W.C.A.T.R. 297); the Board's policy on providing cost relief to Schedule 1 employers for workers under 55 who receive transitional supplements (*Decision No. 438/95* (1996), 39 W.C.A.T.R. 152); calculation of post-accident earnings under section 147(9) (*Decision No. 284/95* (1995), 36 W.C.A.T.R. 181); the Board's policy that a vocational rehabilitation program must be likely to re-establish the worker's "approximate" pre-injury earnings profile (*Decision No. 822/95I* (1996), 37 W.C.A.T.R. 267); and the need to consider whether a worker is entitled to a section 147(4) supplement where a vocational rehabilitation program did not increase his earning capacity to the necessary extent (*Decision No. 127/96* (1996), 38 W.C.A.T.R. 215).

Occupational Stress

Earlier Annual Reports recorded that the Board was in the process of developing a policy on chronic occupational stress, in addition to its policy on stress claims resulting from traumatic and life-threatening events. Bill 99, which is currently being considered by the Legislature, would exclude compensation for chronic stress. However, since the current Act is still in force and no Board policy on chronic stress has been adopted during this reporting period, the Tribunal has continued to adjudicate stress appeals under the Act on a case-by-case basis.

The two previous Annual Reports noted the development of a new test to address the problem of how to assess workplace stressors and workers' subjective reactions. The Tribunal's chronic stress decisions generally apply a two-part test: (1) whether a worker of average mental stability would perceive the workplace circumstances as mentally stressful; and, (2) if so, whether that average worker would be at risk of suffering a disabling mental reaction. This is sometimes referred to as the "reasonable person" or "average worker" test.

Decision No. 826/94 (1995), 36 W.C.A.T.R. 102, considered how this test, which has been applied only to chronic stress, could be reconciled with the thin skull doctrine. The majority concluded that the average worker test is justifiable to the extent that it is a reasonable way of testing the sufficiency of the causal relationship between the workplace event and the chronic stress. The key question is not whether the employment was a significant contributing factor, but the prior question of whether the injuring process arose out of and in the course of employment. Chronic stress cases were found to be distinguishable from cases involving a compensable physical injury which leads to a psychological injury, since it is less difficult to determine if a physical injury arose out of and in the course of employment. The majority concluded that the "average worker" test should not be extended to physical injuries which lead to mental problems.

Two interesting cases considered the effect of technological changes in the workplace. *Decision No. 511/95* (1996), 37 W.C.A.T.R. 210, denied a claim for fibromyalgia caused by stress due to the automation of equipment. The

employer was a small company which had automated to remain competitive. The worker did not use the equipment properly despite many efforts by the employer to encourage him, including more supervision and education. The stress disability was found not to relate to the pressures of employment where the employer had instituted reasonable and legitimate requirements and had tried to help the worker adjust. On the other hand, in *Decision No. 86/96* (1996), 38 W.C.A.T.R. 182, a new computerized inventory system was implemented. The worker was given significant responsibility for the computer without any real training and his workload was increased so that he was unable to keep up. While the worker had a "thin skull", the workplace stress was found to be a significant cause of the worker's psychological disability.

Tribunal cases have continued to distinguish between cases of disability and situations where the worker's reaction to the workplace stress was emotional, but did not amount to true disability. See *Decision No. 50/94* (June 21, 1995).

Occupational Disease

Occupational disease cases involve workplace exposure to harmful processes or substances. The Tribunal's interpretation of the law in this area remains the same. Disabilities are compensable if they fall within statutory provisions governing either "occupational disease" or "disablement".

Decision No. 935/90 (1995), 34 W.C.A.T.R. 1, is the latest in a series of Tribunal decisions on whether manual work, which does not involve vibrating tools, is likely to make a significant contribution to Dupuytren's contracture. *Decision No. 935/90* reviewed the cases to date as well as extensive medical and epidemiological evidence and concluded that medical science still does not know whether manual labour causes or aggravates Duypuytren's disease. While the epidemiological evidence was inconclusive at best, there was clear evidence before the Panel supporting the theory of a causal connection between a number of diseases and genetic factors and the development of Dupuytren's contracture. The Panel found that the mere possibility that a condition is in some way related to work is not sufficient to attract benefits.

Another case involving very complicated medical evidence was *Decision No. 249/96* (1996), 40 W.C.A.T.R. 110, the first Tribunal case to consider the effects of aluminum exposure. While much of the public discussion about aluminum involves a possible connection to Alzheimer's disease, *Decision No. 249/96* did not deal with Alzheimer's disease, but with a worker who was unusually susceptible to aluminum and had a neurotoxic disability. As an electrician between 1966 and 1990, the worker had had extensive exposure to aluminum, including the inhalation of aluminum powder and working with aluminum materials and spray paints. The worker did not use a mask or gloves and also ingested aluminum dust by licking his fingers and placing parts in his mouth. Expert medical evidence at the hearing indicated that there were a number of indicia that the worker suffered from aluminum poisoning including: significantly higher concentrations of aluminum in his blood; symptoms of neurotoxicity; the fact that the disability was limited to the part of the brain typically affected by aluminum; the lack of evidence of any other insult to the

brain; the fact that the worker's cognitive functions ceased to deteriorate after treatment reduced the amount of aluminum in his blood; the absence of any other unusual exposure to aluminum outside of the workplace; and the fact that the worker was an individual who more readily absorbed aluminum than most people. Thus, the medical expert evidence that the worker's neurotoxic disability was likely caused by aluminum exposure appeared strong, while the evidence of any other possible causal factor was virtually non-existent. On the balance of probabilities, the Panel found that the worker's neurotoxic disability was likely caused by his exposure to aluminum at work.

Hearing loss is treated as an occupational disease under the Act, and a number of cases during this reporting period have considered the Board's policy on apportioning between compensable and non-compensable sources of hearing loss. While the "thin skull" principle applies in hearing loss cases, a legally-recognized exception to this principle exists where there is a measurable pre-existing disabling condition. In hearing loss cases, it is often possible to identify pre-existing hearing loss. However, there has been some divergence as to whether it is appropriate to base initial entitlement only on the compensable degree of disability or whether initial entitlement should be decided based on the total hearing loss, and the quantum of the pension then apportioned to reflect the degree of impairment relating to workplace noise exposure. *Decision No. 66/95* (1996), 38 W.C.A.T.R. 95, and the majority in *Decision No. 613/93* (1996), 37 W.C.A.T.R. 77, both held that the latter approach was correct that apportionment should take place at the point of calculating the pension, and not in determining initial entitlement.

Other interesting occupational disease appeals have considered: isocyanate exposure and asthma (*Decision No. 198/93* (March 3, 1995)); asbestos exposure at a smelter and colon cancer (*Decision No. 151/92* (1995), 34 W.C.A.T.R. 35); asbestos exposure as a rigger/boiler-maker and lung cancer (*Decision No. 893/90* (October 8, 1996)); and pension rating for white finger disease (*Decision No. 640/94* (1996), 39 W.C.A.T.R. 78). *Decision No. 893/90* contains an interesting analysis of the association between asbestos-related cancer and asbestosis, given that slight and even moderate asbestosis may go undetected.

Chronic Pain and Fibromyalgia

Earlier Annual Reports have dealt with the issues of chronic pain and fibromyalgia in some detail. While the Board and the Tribunal initially took different views of whether chronic pain was within the scope of the Act, the 1990 WCB board of directors' section 93 review[7] showed substantial agreement between the two institutions. For more detail, see Appendix C to the *Third Report, Annual Report 1991, Annual Report 1992 and 1993* and *Annual Report 1994.* While Bill 99 proposes to change the compensation scheme for chronic pain significantly, appeals coming to the Tribunal during this reporting period continued to be governed by the current Act or the earlier legislation.

7 *Review of Decisions No. 915 and 915A* (1990), 15 W.C.A.T.R. 247. Note: A section 93 review was previously known as a section 86n review.

Under the current Act, workers with chronic pain may be entitled to FEL and NEL benefits. As discussed earlier, a worker's vocational rehabilitation potential is of increased importance under the current Act, in particular with respect to FEL benefits. *Decision No. 722/95* (1996), 37 W.C.A.T.R. 249, comments that vocational rehabilitation is notoriously difficult where the primary disability is pain. The worker may require additional support to cope with and understand the pain symptoms. Where a vocational rehabilitation plan did not address the worker's major disability, which was chronic pain, it was found that the worker was not likely to learn anything. A full FEL award was made. And see *Decision No. 597/92* (1995), 33 W.C.A.T.R. 1, which discusses pension rating for chronic pain under the earlier legislation.

While normally a lack of motivation is not grounds to deny compensation for chronic pain, *Decision No. 915* (1987), 7 W.C.A.T.R. 1, and other Tribunal cases left open the possibility that a worker's undermotivation could be so serious as to constitute an intervening cause and effectively render the contribution of the workplace accident insignificant. *Decisions No. 499/94* (1995), 34 W.C.A.T.R. 155, and *789/96* (December 19, 1996), are examples of this type of undermotivation.

Experience Rating of Employers (NEER)

NEER is an experience rating program which is intended to shift some of the burden of a rate group's costs to employers with above average claim costs. An employer's actual costs in a year are compared with the assessment rate for the rate group and are considered in the calculation of the employer's assessment for three years. This enables the Board to estimate the cost of the claim in the first year and fine-tune it over the next two years.

While Bill 99 contemplates changes to the Tribunal's jurisdiction to review Board policy and assessment practices, decisions released during this reporting period are governed by the current Act and have followed previous Tribunal decisions in holding that the Tribunal has jurisdiction to review decisions which the Board may consider administrative in nature (such as NEER calculations) and to hear all aspects of an employer's assessment appeal. The Tribunal has also held that the systemic effect on the Board's administration must be considered in such appeals.

Decision No. 591/94 (1995), 33 W.C.A.T.R. 157, found that the appropriate standard of review to apply to the Board's NEER policy is a "reasonableness" test but that significant weight should be given to the real merits and justice of a case. While the three-year NEER window is desirable for convenience and finality, NEER policy should recognize exceptional circumstances. The NEER policy should not be applied so as to thwart the purposes of the Second Injury and Enhancement Fund (SIEF), which introduces an element of equity into employer assessments and encourages hiring of workers with pre-existing disabilities. In deciding whether to open the three-year NEER window, the *591/94* Panel identified four considerations: (1) whether the employer showed due diligence in pursuing SIEF relief; (2) the nature of the worker's disability; (3) systemic delays; and (4) the elapsed time between the NEER cut-off date and the SIEF decision. See also *Decisions No. 426/95* (1995), 35 W.C.A.T.R. 230, *86/95I2*

(1995), 36 W.C.A.T.R. 150, *996/94* (October 3, 1995), *1055/94* (January 9, 1996), *954/95* (1996), 39 W.C.A.T.R. 208, and *716/96* (December 31, 1996).

Decision No. 504/92 (1995), 36 W.C.A.T.R. 37, considered the relationship between Board policy on NEER and section 91(7) penalty assessments. Before 1988, it was Board policy that an employer charged with both a section 91(7) penalty and a NEER penalty would be relieved of the lesser penalty. Effective in 1989, Board policy was changed to limit section 91(7) penalties to firms not participating in NEER. It was argued that the policy change should be applied retroactively. The Panel considered prior Tribunal jurisprudence and found that since the policy change was a discretionary one, and not a legal overruling, the Board could determine the appropriate start date for the new policy. The appeal was dismissed as there was no evidence that the policy had been applied in a manner that was arbitrary or discriminatory against the employer.

Other Employer Issues

It is well established in Tribunal cases that interest is generally payable on overdue payments to workers. The Board has also adopted a policy to this effect. This reporting period saw a number of appeals which raised the question of whether interest could be paid on overdue payments to employers. *Decision No. 323/93* (August 7, 1996), records that while the Board has recognized that in certain circumstances it should pay interest to employers, because of technical difficulties related to its computer system, it has not yet implemented an interest policy for employers. Pending the development of Board policy, *Decision No. 526/93* (1996), 39 W.C.A.T.R. 14, and *Decision No. 323/93* found that there was good reason on the facts of those cases to pay interest based on the merits and justice of the employers' appeals.

Decisions No. 864/93I (1995), 35 W.C.A.T.R. 59, and *605/95* (1995), 37 W.C.A.T.R. 226, considered appeals from Workwell audits. In *Decision No. 864/93I*, the Panel expressed concern about the extent of subjective evaluation in a Workwell audit and felt the process might be more fair if more objective criteria were used. In *Decision No. 605/95*, the Panel noted that there is a discretion to relieve an employer of a penalty under Board policy if the employer's default is excusable due to circumstances beyond the employer's control. In this case, the employer was in financial crisis due to a recession and was not in a position to allocate resources to correct defects found in the first audit. These defects were primarily due to a lack of documentation, and the employer began documentation when its finances improved in 1992. In the circumstances, the Panel relieved against a surcharge.

Miscellaneous

An issue which has been noted in earlier Annual Reports is the question of whether the Tribunal has the jurisdiction to consider challenges under the *Canadian Charter of Rights and Freedoms*. *Decision No. 534/90* (1992), 23 W.C.A.T.R. 121, discussed in *Annual Report 1992 and 1993*, found that the Panel did not have jurisdiction to consider a Charter question under section 52(1) of the

Constitution since it did not have the jurisdiction to fashion a suitable remedy in the case. However, the Supreme Court of Canada decision in *Schachter v. Canada* (1992), 93 D.L.R. (4th) 1, which issued at about the same time as *Decision No. 534/90* but was not brought to that Panel's attention, indicated that remedial powers under section 52(1) included the ability to "read in" a provision to a piece of legislation. *Decision No. 534/90R* (1995), 37 W.C.A.T.R. 1, decided to reopen the earlier decision in light of this new remedial power. The Panel noted that "reading in" is an unusual power, which must be applied with great care. However, it was prepared to assume jurisdiction at this point although it might need to revisit its jurisdiction if at a later point it did not appear that there was any appropriate remedy.

Decision No. 142/94 (April 4, 1995), found that the Tribunal was not a court of competent jurisdiction under section 24 of the Charter but that, even if it were, the Tribunal did not have the jurisdiction to grant exemplary damages or a declaration as a Charter remedy. A party's right to sue for a constitutional tort was not taken away by the *Workers' Compensation Act*. *Decision No. 34/92* (1996), 40 W.C.A.T.R. 1, considered the argument that recovery of an overpayment by the Board amounted to "cruel and unusual treatment or punishment" in violation of section 12 of the Charter where the worker was previously convicted by a criminal court of fraud, given a suspended sentence and ordered to perform community service. Assuming that repayment might be argued to constitute "treatment", the Panel found repayment was not so excessive as to offend standards of decency. There was no Charter violation.

An area of continuing development in Tribunal case law is the calculation of a worker's earnings basis. For example, where a worker has seasonal or casual employment, what period of time should be used as the basis for the calculation and should any unemployment insurance benefits or earnings with other employers be included? See *Decisions No. 1080/94* (1995), 37 W.C.A.T.R. 173, *721/95* (1996), 40 W.C.A.T.R. 91, and *1035/96* (November 29, 1996). How should deductions for income tax be made (*Decision No. 28/95* (1996), 38 W.C.A.T.R. 81), and what credit should be given for room and board (*Decision No. 199/96* (November 12, 1996))?

Other significant legal and medical issues to come before the Tribunal included: whether the Act removed the right to sue for punitive damages (*Decision No. 676/94* (1995), 33 W.C.A.T.R. 185); whether the Act applies to First Nations and, if so, how an Indian band should be treated (*Decision No. 79/94* (1995), 34 W.C.A.T.R. 135); whether the *Mental Health Act* applies to release of psychiatric records contained in Board files (*Decision No. 745/91R3* (1995), 36 W.C.A.T.R. 9); the impact of amendments to the *Insurance Act* and the *Workers' Compensation Act* on an employer's subrogated right of action and the Tribunal's jurisdiction to consider applications by an insurer from whom statutory accident benefits are claimed (*Decision No. 145/95* (1995), 35 W.C.A.T.R. 195, and *Decision No. 830/95* (1995), 37 W.C.A.T.R. 278); and when it is appropriate to recover an overpayment to a worker (*Decisions No. 828/94* (1995), 35 W.C.A.T.R. 163, *879/92* (1996), 37 W.C.A.T.R. 56, and *34/92* (1996), 40 W.C.A.T.R. 1).

A number of decisions issued on matters of particular concern to workers' compensation proceedings, either practice and procedure at the Tribunal or the

relationship between the Tribunal and the Board. *Decision No. 963/96I* (1996), 40 W.C.A.T.R. 255, contains a good discussion of tripartite decision-making at the Tribunal. A hearing before a new panel was ordered where there was a reasonable apprehension that a final conclusion might have been reached before the Panel members had had an opportunity to caucus and discuss the case together. See also: *Decision No. 888/94* (1995), 35 W.C.A.T.R. 175, which found that the Tribunal has no jurisdiction over the internal processes at the Board except where this is somehow necessary to discharge an appellate function; *Decision No. 466/95I* (1995), 35 W.C.A.T.R. 238, which considered the limits on the Tribunal's investigative powers; *Decision No. 776/93I2* (1995), 35 W.C.A.T.R. 54, on the criteria for allowing intervenors in Tribunal proceedings; *Decision No. 762/91R3* (1996), 38 W.C.A.T.R. 1, on the test to be applied on a second reconsideration request; *Decision No. 28/95* (1996), 38 W.C.A.T.R. 81, on the role of Tribunal counsel in making submissions on the law; and *Decision No. 935/95I* (1996), 39 W.C.A.T.R. 177, on the circumstances in which the withdrawal of an appeal should be refused.

JUDICIAL REVIEW APPLICATIONS

In 1995 and 1996, applications for judicial review were heard by the Divisional Court in respect of the following seven cases:

- *Decision No. 775/92*, heard February 15, 1995
- *Decision No. 882/92*, heard June 23, 1995
- *Decisions No. 662/92I* and *662/92*, heard November 17, 1995
- *Decisions No. 468/92* and *468/92R*, heard November 30, 1995
- *Decision No. 82/93*, heard December 11, 1995
- *Decision No. 716/91*, heard December 14, 1995
- *Decisions No. 351/93* and *351/93R*, heard May 8, 1996.

All seven applications were dismissed.

Motions for leave to appeal decisions of the Divisional Court upholding Tribunal decisions were brought to the Court of Appeal in the following two cases: *Decisions No. 468/92* and *468/92R*, and *Decision No. 82/93*. These applications were dismissed on February 12, 1996, and June 12, 1996, respectively.

A motion for leave to appeal to the Court of Appeal respecting the decision of the Divisional Court upholding the Tribunal's *Decision No. 716/91* was heard on April 1, 1996, and leave was granted. As of the end of the reporting period, this appeal was still pending.

Applications for judicial review of the following six cases remained outstanding and unheard as of the end of 1996:

- *Decision No. 432/94*
- *Decision No. 850/94*
- *Decision No. 24/96*
- *Decision No. 81/95*
- *Decision No. 1120/96*
- *Decision No. 199/94.*

OTHER COURT MATTERS

On December 2, 1992, an injunction was granted by the Ontario Court (General Division) restraining an applicant from proceeding with a section 17 application before the Tribunal until the trial or other final disposition of the matter. The Tribunal had been accorded status as a friend of the Court and opposed the granting of the injunction on jurisdictional grounds. On February 4, 1993, the section 17 applicant's application for leave to appeal from this decision was granted by the Divisional Court, and on June 9, 1993, the Divisional Court set aside the injunction. On January 24, 1994, the respondent's application for leave to appeal to the Court of Appeal was granted. As of the end of the reporting period, this appeal was still pending.

OMBUDSMAN COMPLAINTS

Since its inception in 1985, the Tribunal has received, on average, notification of approximately 60 Ombudsman complaints a year. The Tribunal's Case Tracking System indicates notification of 50 complaints in 1995 and 48 complaints in 1996. It should be noted that an Ombudsman complaint can relate to a Tribunal decision made at any time, so that complaints received in 1996 would not necessarily deal with 1996, or even 1995, cases.

The Ombudsman's office thoroughly investigates complaints and also considers the reasonableness of the Tribunal's analysis. The proportion of complaints in which the Ombudsman has found no cause to question the Tribunal's decision has always been very high. In 1990, the Tribunal began to track the outcomes of complaints in more detail. While most Ombudsman investigations result in a letter from the Ombudsman advising that there is no reason to question the Tribunal's decision, since 1990 26 have resulted in the Tribunal undertaking a reconsideration process. Twenty-three of these reconsiderations have been completed. Six were completed during this reporting period with the following results: two were denied, one was withdrawn, one was allowed, one was allowed in part, and one clarified an earlier decision.

One of the Ombudsman's investigations disclosed a need for more documentation on the Tribunal's policies for reimbursing workers and their witnesses for hearing expenses. While the Tribunal generally follows the Board's practice in this area, it appeared that we were not communicating our policies in that regard very well. Accordingly, during this reporting period, the Hearing Expense Claim form was revised and a new Practice Direction dealing with fees and expenses was prepared. The Practice Direction was formally approved shortly after the reporting period ended (on February 5, 1997) and a copy is to be found in Appendix C.

The Tribunal Report

VICE-CHAIRS, MEMBERS AND STAFF

Lists of the Vice-Chairs and Members, senior staff and Medical Counsellors who were active during the reporting period, as well as a record of the roster changes and résumés for newly appointed Vice-Chairs and Members, can be found in Appendix D.

OFFICE OF COUNSEL TO THE CHAIR

Although the Office of Counsel to the Chair (OCC) has been in existence since the creation of the Tribunal, its activities have generally been reported in the context of the Report of the Tribunal Chair on the draft review process, rather than as a Tribunal department.

The draft review process provided by the Counsel to the Chair and the Associate Counsel to the Chair is one of the major institutional means for promoting the quality and consistency of Tribunal decisions. The Tribunal has always recognized the need to be fully respectful of the hearing panels' independence and autonomy, and a draft is only reviewed at the drafter's request. Following the comments of the Supreme Court of Canada in 1992 on another tribunal's draft review process,[1] the Tribunal's process was reviewed again and formal *Guidelines for Review of Draft Decisions* were adopted. These continue to be followed by OCC lawyers. The Guidelines describe the process in some detail and appear as Appendix A to the *Annual Report 1992 and 1993.* They have also recently been reproduced in *Administrative Agency Practice,*[2] a practice guide for administrative agencies and practitioners edited by James Sprague.

Other OCC responsibilities include training, current awareness and research services, administering the reconsideration process, responding to *Freedom of Information and Protection of Privacy Act* issues and complaints, and assisting with Ombudsman matters.

TRIBUNAL COUNSEL OFFICE

The Tribunal Counsel Office (TCO) consists of five groups, each reporting to the General Counsel. This structure reflects a reduction in the number of groups from prior reporting periods, from six to five, because the former Case Description group has been amalgamated with Intake.

1 *Tremblay v. Quebec (Commission des Affaires Sociales)* (1992), 90 D.L.R. (4th) 609.

2 (1997), 2 A.A.P. 137.

Intake

The Intake department handles all incoming appeal applications and the public's questions about appeals and about the appeal process.

The Intake department is also primarily responsible for the Tribunal's "special section" cases. The special section cases include access to worker file cases (under section 71), employer requests for medical examination (under section 23) and cases on the right to maintain civil actions for damages (under section 17).

The Intake group now also includes the case analysts who are responsible for the production of the Case Record. This change reflects the amalgamation with Intake of the former case description group, and a change in their work, which resulted from the Phase II Restructuring Plan. In the past, the case description writers produced a brief written description of the history and issues for every file, and undertook an extensive sorting of the file material. Both these activities are no longer carried out. To reflect this change, the title of the document formerly called the "Case Description" was changed to "Case Record". The job title of the former case description writers was changed to "case analysts". The case analysts continue to receive technical advice from a senior Tribunal lawyer.

With the introduction of the case management functions, the case analyst group has also become more actively involved in reviewing appeals to ascertain if they are ready to proceed to hearing. The case analysts identify issue agenda problems including jurisdictional problems (arising largely due to the fact that related issues may not yet be resolved at the Board level) and may assist parties to understand the law and policy relevant to their appeal. They make recommendations about whether an appeal is suitable for a written hearing and about whether it will require a full-day or half-day hearing.

Pre-hearing Legal Workers

When the case record is complete, the case is scheduled, and is transferred either to a pre-hearing legal worker or to a lawyer, for carriage through the hearing process. Over 95% of cases are handled by legal workers. These legal workers deal with matters that arise pre-hearing, and provide assistance to the parties if there are questions respecting the preparation of the cases.

The Pre-hearing Legal Workers who work on the "mainstream" cases are headed by the manager of the Pre-hearing Group. In 1996, one senior legal worker was also assigned to work directly with the VRT Panel.

Lawyers

In 1995 and 1996, there were five lawyers in TCO, as well as one articling student.

Lawyers continue to handle a small number of the most complex cases, involving novel legal issues or issues which have been identified as involving a significant Tribunal interest. The work of TCO lawyers has also increasingly involved either work for the new specialized teams or the provision of technical advice to the pre-hearing group or case analysts. One TCO lawyer was assigned on a full-time basis to the Case Management team and, after this role was completed, to the new Early Resolution Team. Another TCO lawyer was assigned to the VRT team. Still another lawyer has taken responsibility for advising on all NEL, FEL, reinstatement and employer assessment and classification issues, and supervision of the pre-hearing legal workers on those issues, and another has undertaken a similar role on files involving stress, chronic pain, occupational disease, hearing loss and psychiatric issues. As stated above, the fifth TCO lawyer advises the case analyst group.

TCO lawyers also handle applications for judicial review and other court-related matters.

Post-hearing Legal Workers

When a panel identifies that additional information is required after a hearing, a request is made to the post-hearing legal workers, who co-ordinate this continuing investigation.

The post-hearing legal workers are headed by the Senior Legal Worker, Post-hearing.

Medical Liaison Office

The Medical Liaison Office (MLO) co-ordinates and oversees all of the Tribunal's interactions with the medical community and facilitates the Tribunal's use and understanding of medical evidence.

The Tribunal has an interest in ensuring that hearing panels have sufficient and appropriate medical evidence on which to base decisions. All Case Records are reviewed by MLO for the purpose of identifying those cases in which the medical issues may be problematic, complex or novel to the Tribunal. Those cases selected from this process are referred to the Tribunal's medical counsellors to check that the medical assessment of the worker's injury is complete and that the record contains opinions from appropriate experts where required, and to ensure that questions or concerns about the medical issues that may need clarification are identified.

At the pre-hearing stage, medical counsellors may recommend getting more information from the patient's treating physician(s). In addition, counsellors may recommend obtaining a medical assessor's opinion if the diagnosis of the worker's condition is unclear, if there is a complex medical problem that needs explanation, or if there is an obvious difference of opinion between qualified experts.

At the post-hearing stage, panels requesting further medical investigation may request the assistance of MLO in preparing specific questions that may be helpful in resolving medical issues that are troubling to the panel. Counsellors assist MLO in providing additional questions for the hearing panel's consideration, which if approved are passed to the medical assessor.

Provision of information

MLO continues to place in the WCAT Library, medical reports and transcripts of WCAT experts on medical/scientific issues that contain information that may be useful in future appeals. This collection of medical reports specific to issues that arise in the workers' compensation field is unique within the Ontario WCB system and is accessible to the public. Discussion papers on general medical topics that frequently arise in compensation matters are prepared by the Tribunal's medical counsellors or medical assessors and are also available in the Library.

Audit

In addition to case-specific medical evidence issues, MLO co-ordinates the Tribunal's medical audit. The purpose of the audit is to obtain from the medical counsellors a medical professional's perspective on the manner in which medical facts or theory are treated or recorded in Tribunal decisions. The audit permits the Tribunal to evaluate its processes and practices as they relate to medical issues and medical evidence. The audit highlights areas where medical education initiatives for Tribunal staff and members are indicated.

MLO and the Medical Component

Medical assessors

The Tribunal has the power to initiate further medical investigations to determine any medical question at issue on an appeal. Such investigations, including further examination of a worker, may be referred to qualified medical practitioners on a list of authorized practitioners (the Tribunal's "medical assessors") who are appointed by the Lieutenant Governor in Council.

The Tribunal continues to retain and attract to its medical assessor roster many of the Province's most distinguished medical experts. A concerted effort has been made to recruit qualified female physicians and doctors with diverse cultural and language backgrounds.

The medical assessor may be asked for an opinion as to the validity of a particular medical theory which a hearing panel has been asked to accept, or to provide a diagnosis if the opinions on file are not clear or are in conflict, or to comment on the representative nature, quality or relevancy of a selection of medical literature that the Tribunal may have been asked to consider.

The opinions are normally sought in the form of written reports containing the history, observations and test results on which the opinion is based. Copies of the reports are made available to the worker, employer and the WCB, and references will typically be made to the report in the Tribunal's reasons for its decisions. On occasion the practitioner will be asked to appear at the hearings and give oral evidence.

Medical counsellors

The Tribunal's medical counsellors are a group of senior specialists who serve as wise counsel to the Tribunal in the medical area generally. The medical counsellors group is chaired by Dr. Douglas P. Bryce. (A list of the medical counsellors can be found in Appendix D.)

Cases selected by MLO are referred to the Tribunal's medical counsellors to ensure that the medical assessment of the worker's injury is complete, the record contains opinions from appropriate experts when required, and questions or concerns about the medical issues that may need clarification for the hearing panel are identified. Unlike the medical assessors, the counsellors do not examine workers nor do they give evidence or otherwise communicate with hearing panels in individual cases. Where this role is required, the counsellors make a recommendation to MLO that an assessor be retained.

Counsellors participate in the internal audit referred to above and, through an ongoing series of lectures, the counsellors also contribute to enhancing the level of the Tribunal's general medical literacy.

SCHEDULING

Regional Hearing Rooms

The Tribunal conducts regional hearings throughout the province. In 1995, the Tribunal began to hold hearings in a variety of government buildings in the regions. This was a departure from the practice of using hotel board rooms, and was motivated by the desire to take advantage of government facilities which were available to the Tribunal without cost.

By late 1996, the Tribunal revisited the issue of the use of government board rooms as our experience with the arrangements was unsatisfactory. The scarcity of available, suitable government board rooms in central, convenient locations was a significant obstacle. As well, the lack of administrative support, communication difficulties and lack of access to facilities such as fax machines and photocopiers were issues of concern raised by the participants in the hearings.

After assessing the experience with the government facilities, it was decided in October 1996 to return to the previous practice of using hotel board rooms for the regional hearings.

INFORMATION DEPARTMENT

Library Services

The Library is responsible for the provision of information services to Tribunal staff and Members as well as other parties involved in workers' compensation issues.

Service to the workers' compensation community

The mission of the Library, as expressed in the Tribunal's 1988 *Statement of Mission, Goals and Commitments* (reproduced as Appendix A to the Tribunal's *Third Report, 1987-1988*), has been to:

> ... provide access to information which is not conveniently assembled elsewhere, and which workers and employers, members of the public, professional representatives, and Members and staff of the Tribunal require if they are to truly understand the workers' compensation system and the issues which it presents, or be able to prepare on a fully informed basis for presenting or dealing with such issues in individual cases.

Since its inception, the Library has remained committed to this mission. Its resources, which include traditional paper formats as well as CD-ROM and in-house databases, comprise one of the most extensive collections of workers' compensation research materials in Canada. Librarians index materials on in-house databases so as to provide ready access to unique and otherwise inaccessible items including policy documents, conference papers, WCAT medical reports, book chapters and articles. The librarians assist users with a variety of backgrounds and needs from simply locating a specific item to detailed research on complex workers' compensation issues. The combination of a well-developed collection and a commitment to service has created a place for the WCAT Library as a vital and unique resource for both internal and external users. This has become increasingly apparent during the reporting period and is reflected in increased usage.

The WCAT web site

In order to provide another means of disseminating information about the Tribunal and its processes to the public, particularly workers, employers and their representatives, the Library created a WCAT web site in 1996.

The site includes information on the Tribunal's appeal processes, services and publications. The *Practice Directions* and recent issues of *WCAT In Focus* are also featured. As well, there are links to related external web sites such as the WCB's home page and the *Workers' Compensation Act*.

The purpose of the web site is to provide current information about the Tribunal to anyone with Internet access. This should address the increasing expectation by Tribunal stakeholders that information be available through this

new medium. It remains to be seen how a web presence affects requests for information through traditional means.

This first phase of our web site experiment has a simple and straightforward format, and we can look forward to it evolving into a thorough information source and research tool over time.

The web site address is *http://www.wcat.on.ca.*

Access to Internet resources

In addition to providing a web presence for the Tribunal, the Library started providing staff and Members with access to the increasingly useful resources available on the Internet. The librarians assist users in accessing the Internet at one of the Library terminals and train Tribunal staff in searching the Internet, particularly the World Wide Web.

Addition of the CD-ROM format

During 1996, staff began the process of evaluating CD-ROM products for use in the Library. It became apparent that there would be significant space savings without additional cost. Increased search capabilities and desktop access were other beneficial factors to be considered.

CD-ROM versions of the *Canadian Encyclopedic Digest*, the *Ontario Statutes* and *Regulations*, and *Physicians Silverplatter Occupational and Environmental Medicine* were purchased. In addition, the Library acquired one of the Canadian Centre for Occupational Health and Safety's CD-ROM products on a complimentary basis in return for supplying Tribunal data to the CCOHS. The four products are now available for use on a public access computer in the Library; they will be evaluated before making further purchases or mounting products on the Tribunal network.

Library staff are now making themselves familiar with these products and taking advantage of training provided by vendors and librarians' organizations.

Library statistics

Statistics for the years 1994 through 1996 are included so as to provide a means of comparison.

Collection Development

Additions to the book and government document collections:
1994: 160 1995: 136 1996: 226.

Additions to the in-house database of articles, WCB documents, WCAT Medical Reports:
1994: 1056 1995: 1086 1996: 1366.

Usage

Documents borrowed by Tribunal staff and Members:
1994: 285 1995: 327 1996: 306.

Interlibrary loan and document delivery:
1994: 395 1995: 326 1996: 441.

Reference service

Directional requests (usually locating a specific item):
1994: 628 1995: 1068 1996: 1160.

Reference requests (requiring more detailed research):
1994: 962 1995: 972 1996: 985.

Publications Department

Accomplishments

During the reporting period, the Publications Department completed a long-term project which has resulted in the *Decision Digest Service* (DDS) binders now containing summaries for all Tribunal decisions. The DDS started in January 1990, and has provided summaries for all Tribunal decisions released since then. However, summaries for pre-1990 decisions were not included (though the indexes in the *Cumulative Index* binder had always covered all decisions released from the commencement of the Tribunal). Two supplementary binders were added to the DDS which cover the summaries for the approximately 4,000 pre-1990 decisions. Summaries were written for those pre-1990 decisions which had never been summarized. The existing summaries were re-keyworded so that all decisions in the DDS are classified using the current set of keywords. The publication, *Numerical Index of Decisions*, thus became redundant.

The *DDS On Disk - Windows Version* was made available to subscribers during the reporting period. Previously it had only been available for public searching in the Tribunal's Library. The *Cardbox for Windows* search software offers such familiar Windows features as point and click selection, drop down menus, a more readable search screen and on-line help. The Tribunal no longer offers the DOS version of the *DDS On Disk* to new subscribers (though updates will continue to be provided to existing DOS subscribers).

The Publications Department has changed the production process for the Tribunal's newsletter, *WCAT In Focus*, to make printing of the newsletter faster and cheaper. *WCAT In Focus* will no longer appear at set quarterly intervals. It will be published as needed to keep readers informed of changes at the Tribunal.

The procedure for releasing decisions to the parties and the Board has been revamped. As a result, files can be closed at the Tribunal and returned to the

Board more quickly. The Board, therefore, can begin to implement any actions required by Tribunal decisions more quickly.

In 1994, the Publications Department released and summarized just over 1,000 Tribunal decisions. In each of the years 1995 and 1996, it released and summarized, on average, more than 1,400 decisions per year, a 40% increase.

Proposals

The Publications Department plans to publish a *Consolidated Index* covering volumes 1 to 38 of the *WCAT Reporter.* This special volume of the Reporter would make research of the decisions in the Reporter much faster. It could contain, in a consolidated format, a bilingual Table of Cases, Subject Matter Index and Keyword Index.

The Tribunal is in the process of negotiating an agreement with QL Systems Ltd. which would see the full text of Tribunal decisions placed on QL's database system. This would greatly increase accessibility to online searching of the Tribunal's decisions, particularly for the legal community.

The Publications Department may soon acquire desktop faxing capability. This could lead to a review of its Photocopy Service pricing structure.

SYSTEMS DEPARTMENT

The goals for the Systems Department in 1995 included the ongoing project, started in 1994, of upgrading our old system to a more robust environment that permitted the use of microcomputer based technology. It included a new word processing package, electronic mail program and network operating system, additional hardware and the transfer of legacy information to the new environment. Further goals set for 1996 encompassed a new anti-virus program for all computers, an upgraded electronic mail system which included group conferencing, test installation of a new operating system, setting up of a modem pool to allow shared access to outside resources and portable computers (notebooks) for OICs to use in decision-writing. In addition to the above items, there was an ongoing project to provide training and support in the use of the new software/hardware and utilities to assist in daily work.

The migration from one system to another required months of preparation, including the conversion of thousands of existing documents, forms and templates. All of the above projects were completed on time and within the allocated budget.

In 1997, we plan to continue upgrading our client computers to the Windows 95 operating system and the related software packages they utilize. The NT Server computers are also scheduled for upgrades and patches as they become available and are tested. As the end users are becoming more familiar with the computers we are receiving requests for new custom applications which we plan to provide.

STATISTICAL SUMMARY

This statistical report provides an overview of the Tribunal's production and caseload inventory trends. The report begins with an accounting of the numbers and types of cases received. This is followed by a section providing the numbers and types of cases closed. The third section describes the current caseload (the cumulative difference between cases received and cases closed) sometimes referred to in this report as "inventory" of cases. In the fourth section, typical overall case-completion times are discussed. The next section examines the hearing and decision production figures. Finally, hearing representation profiles are presented regionally for workers and for employers.

Cases Received

The breakdown of incoming cases is presented by year and by appeal type in Table 1 (p. 45) and by general appeal categories in Chart 1 (p. 46). In 1996, the Tribunal's total incoming caseload was the highest ever experienced. This total (3,598 cases) represented a continuation of the upward trend that had begun in 1991. The 1996 total represented an increase of 54% over the 1995 total (2,337), and an increase of 128% over the 1991 total (1,579).

The Tribunal's incoming caseload increase was most pronounced in the core "entitlement" category where the workload per case is most substantial. This category includes appeals relating to benefits entitlement, reinstatement and vocational rehabilitation obligations and employer assessments. Since 1991, when the caseload increase began, the number of cases received in this principal category each year had increased by the end of the reporting period 238% (from 834 cases in 1991 to 2,819 in 1996). The proportion of entitlement cases to the total intake has increased since 1991 from 53% to 76%.

In contrast to the proportional increase of entitlement-related cases, we note the proportional decrease of "special section" cases. (Special section cases refers to applications on matters where the Tribunal has exclusive jurisdiction, including leave applications, right to sue matters and medical examination matters, and appeals relating to access to medical records.) In total, special section cases were reduced in proportional terms to 16% of the Tribunal's overall intake in 1996, as compared to 35% of the overall intake in 1991.

Post-decision cases (Ombudsman's investigations, judicial reviews and requests to reconsider earlier Tribunal rulings) represented in 1995 and 1996 a typically small portion of the total caseload (6% and 5% respectively).

Case Dispositions

In 1996, the Tribunal disposed of 2,512 cases (Table 2, p. 47). This number represented a major increase from the total number of cases disposed of in any other year of the Tribunal's history. The 1996 total was 17% higher than the 1995 total, and 40% higher than the 1994 total.

Entitlement-related cases (including benefits entitlement, as well as employer assessments, reinstatement and vocational rehabilitation obligations) represented 66% of the cases disposed of in 1996, special section cases accounted for 22%, post-decision issues accounted for just over 7%, and jurisdiction cases another 4%. This compares with 56%, 31%, 11% and 2% respectively in 1991.

In anticipation of the terminology that has been adopted in the Tribunal's operational plan for 1997, we have in this Annual Report introduced the categories of "pre-hearing dispositions" and "post-hearing dispositions". Pre-hearing dispositions include the cases previously recorded as "withdrawn" as well as those previously recorded as dispositions for "non-jurisdictional" reasons or those cases that were "abandoned". The abandoned cases were those that were not formally withdrawn but where consistent failure of the appellant to reply to communications finally led the Tribunal to conclude that the case had been abandoned.

Cases that are recorded as "withdrawn" have usually involved some substantial administrative and professional work on the part of the Tribunal. A proportion are identified quickly in the intake phase of the Tribunal's process as simply being in the wrong place - there has been no "final decision" at the WCB - or the appeal is premature, etc. Once the appellant is advised of those circumstances, he or she withdraws the appeal and reverts to dealing with the WCB on the case. Another proportion of withdrawals also occurs at the intake phase but after the Tribunal case analysts have analyzed the case and have identified issues that a WCAT hearing panel will probably need to have the WCB resolve before the appeal can be heard by the Tribunal. Again, when this probability is brought to the attention of the appellant, the frequent response is to withdraw the appeal while the remaining issues at the Board are decided.

We do not track the proportion of cases withdrawn in these two sets of circumstances that re-appear at WCAT as new appeals at some later time. The withdrawals are counted as "dispositions" and the anecdotal evidence suggests that a significant proportion of them are finally resolved at the Board without having to come back to the Tribunal.

Another number of withdrawals will occur in the Tribunal Counsel Office's administration of the case as it prepares the case for hearing and discovers matters that need to be addressed at the WCB before the case is ready to be dealt with by a Tribunal hearing panel. Also, with the introduction under Phase I of the Tribunal's Restructuring Plan of the dedicated Vocational Rehabilitation panel and its experimentation with pre-hearing and in-hearing ADR techniques, a number of cases are withdrawn at that stage when a settlement between the worker and the employer has been reached which is satisfactory to the parties and the Tribunal panel. A withdrawal of the appeal may be the technical means necessary to give effect to the settlement.

It is anticipated that under the Tribunal's Phase II Restructuring Plan with its increased emphasis on the ADR possibilities, there will be a significant increase in this category of withdrawals.

In 1996, post-hearing dispositions accounted for the majority of dispositions (69% of the entitlement-related cases). Among the pre-hearing dispositions, withdrawals were most common. (Pre-hearing withdrawals accounted for 30% of the total dispositions). Case abandonments accounted for 7% of the total dispositions, findings of no-jurisdiction accounted for 3%, and other unspecified dispositions accounted for the remaining 7% of the total. There were similar figures in 1995. (Please refer to Table 3, p. 48)

Inventory – Backlog

Chart 2 (p. 49) presents the trend lines for incoming cases, cases disposed of, and the resulting inventory of cases remaining. The rising trend in the Tribunal's incoming caseload began in 1991. The increase for 1991 was relatively minor, and that year, the Tribunal disposed of approximately 200 cases more than it opened. In 1992, the incoming caseload increased more sharply, but the Tribunal's production (case dispositions) did not keep pace. As a result, the inventory grew by approximately 140 cases. In 1993, there was a further and more pronounced increase in the incoming caseload, and although the production also rose to near peak levels, the inventory nonetheless expanded by another 288 cases. In 1994, the rise in the number of incoming cases was modest. However, the intake began to accelerate dramatically part-way through 1995. Productivity increases began to follow suit and by the end of 1995 the Tribunal had narrowed the gap between the annual number of cases opened and the annual number of dispositions to within 196 cases. But, by the end of 1995, the total inventory had still accumulated to over 2,400 cases.

In 1996 the incoming caseload continued to accelerate, and even though the Tribunal set another new record level in terms of the total number of dispositions, the production total was overwhelmed by the influx of new appeals. By the end of 1996, the total number of cases in the Tribunal's inventory had reached 3,515.

An analysis of this total caseload inventory was undertaken in order to quantify the proportion that represented "backlog". In the Tribunal's terminology, backlogs are measured by the extent to which the Tribunal's actual performance has fallen short of planned goals. Backlog is to be contrasted with "workload". The Tribunal's *workload* is the number of cases to be found in its processes at a point of time when it is, on average, disposing each month of the same number of cases that it received that month while at the same time meeting its agreed speed-of-disposition standards.[3] The total "inventory" of cases to be found within the Tribunal's doors at any point in time is comprised of the workload plus any backlog. When the Tribunal is meeting its performance standards the inventory and the workload will be one and the same thing.

3 The Tribunal's speed-of-disposition standards formally adopted at the end of the reporting period, are that 60% of all cases received will be disposed of within eight months and at an average of six months per case, 20% will be disposed of within 11 months at an average of nine months per case, 15% will be disposed of within 15 months at an average of 12 months per case, and 5% will be disposed of within 18 months at an average of 16 months per case.

An analysis of the workload implications of the above-mentioned speed-of-disposition standards indicates that, if the Tribunal were meeting those standards while disposing of cases at a rate matched to the 1996 incoming level (300 per month), the Tribunal's workload at any point of time would be 2,400 cases. This workload would include the 300 cases received in the month just past, and the 300 cases to be disposed of in the month ahead and all of the cases progressing through the Tribunal's processes in the ordinary course between those two points.

As noted above, the total caseload inventory had reached 3,515 cases by the end of December 1996. The backlog portion amounted, therefore, to 1,115 cases (3,515 minus 2,400).

Case Completion Times

Of course, because of the inability to match production with intake during this period the Tribunal did not perform up to the specified speed-of-disposition standards.

For cases that were disposed of in 1996 in the entitlement and right to sue categories (i.e., not counting the less work-intensive cases such as medical examination, file access and post-decision review), the median age at closing had reached nearly 14 months. Approximately 18% of the completed cases were resolved within six months and another 22% were completed between six and twelve months. Thus, while approximately 40% were completed within a one-year time frame, approximately 26% took between 12 and 18 months, and approximately 34% required more than 18 months. (Please refer to Tables 4 and 5, p. 50)

This "age at closing" measure includes all of the days (including weekend and statutory holiday days) between the receipt of the initial appeal request and the date of administrative closing. In addition to the time backlogged cases spent waiting to enter the process, the age at closing measure includes days the Tribunal spent waiting for the WCB claim files, days spent waiting for appeal applications and response forms to be received, days spent waiting for the agreed upon hearing dates to arrive, and the days involved in post-hearing investigations. It also includes the time spent in the administrative closing process, or in other words, the time spent gathering, referencing and filing the appeal records after decisions have been delivered.

Hearings and Decisions

In 1996, the Tribunal posted record high production levels in all hearing and decision production categories. For example, the total number of cases heard in 1996 (1,449) was 18% higher than 1995 and 35% higher than 1992. (Refer to Table 6, p. 51)

In 1996, the Tribunal conducted 1,563 hearings, and released 1,460 decisions. Most of the decisions represented final rulings (1,175) and there were interim decisions (187) and rulings on reconsideration matters (98) as well. (Refer to Table 7, p. 51)

The hearings were most often conducted in the formal, oral format. Oral hearings accounted for 82% of the hearings in 1996. Another 9% of hearings were accounted for by panel reviews of the written record and written submissions (8% of entitlement cases and 38% of the special section cases). Other panel caucuses, for dealing, for example, with reconsideration applications, accounted for the remaining 8%.

Representation at Hearings

Employers were most often represented by company personnel (approximately 44% of the time). Consultants were their next most frequent representation choice (17%), followed by lawyers (14%), and the Office of the Employer Adviser (11%). In the remaining cases (14%), the employers chose not to attend.

Workers chose consultants most commonly (approximately 27% of the time[4]), followed by the Office of the Worker Adviser (24%), lawyers and legal agencies (23% of the time), and union representatives (approximately 14% of the time). Workers were unrepresented (i.e. self represented) 9% of the time and they used various other, unidentified types of representatives approximately 3% of the time.

When this data is examined by region as in Table 8 (p. 52), we see that for employers in the North, there is a much stronger emphasis on representation by company personnel. In the Toronto region, there is a stronger emphasis on representation by consultants (19%). For worker representation it is interesting to note the very strong preference for OWA representatives in the Northern region (47%).

FINANCIAL MATTERS

Statements of Expenditures and Variances for the years ended December 31, 1995, and December 31, 1996, (Tables 9 & 10, p. 53) and Statements under the *Public Sector Salary Disclosure Act* for 1995 and 1996 (Tables 11 & 12, p. 54), are included in this report.

The accounting firm of Deloitte & Touche has completed a financial audit on the Tribunal's financial statements for the period ending December 31, 1995. The audit reports are included in this report as Appendix E. The audit on the financial statements for the period ending December 31, 1996, is not yet available.

4 In 1994, this figure was 12% and in 1991, 6%. In 1991, 22% of workers were unrepresented and in 1996 that had fallen to 9%.

TABLE 1

Annual Breakdown of Incoming Cases

	1991		1992		1993		1994		1995		1996	
	No.	(%)	No.	(%)	No.	(%)	No.	(%)	No.	(%)	No.	(%)
Leave	31	2	35	2	13	1	17	1	17	1	12	0
Right to Sue	127	8	124	7	113	5	49	2	45	2	47	1
Medical Exam	65	4	76	4	49	2	41	2	26	1	23	1
Access	324	21	370	20	511	24	506	23	466	20	448	14
Special Section subtotal	**547**	**35**	**605**	**33**	**686**	**32**	**613**	**28**	**554**	**24**	**530**	**16**
Classification Pending *	0	0	0	0	0	0	0	0	0	0	343	n/a
Pension	2	0	58	3	84	4	32	1	12	1	35	1
N.E.L./F.E.L. **	0	0	3	0	13	1	34	2	66	3	237	7
Commutation	6	0	26	1	36	2	35	2	33	1	40	1
Employer Assessment	6	0	25	1	26	1	58	3	78	3	169	5
Entitlement	788	50	816	45	988	46	1099	50	1255	54	1848	57
Reinstatement	31	2	39	2	49	2	56	3	63	3	30	1
Vocational Rehabilitation ***	1	0	19	1	72	3	80	4	79	3	117	4
Entitlement-related subtotal	**834**	**53**	**986**	**55**	**1268**	**59**	**1394**	**63**	**1586**	**68**	**2819**	**76**
Judicial Review	4	0	7	0	9	0	8	0	5	0	5	0
Ombudsman Request	65	4	45	2	50	2	35	2	50	2	48	1
Reconsideration	85	5	61	3	63	3	74	3	94	4	126	4
Post-decision subtotal	**154**	**0**	**113**	**6**	**122**	**6**	**117**	**5**	**149**	**6**	**179**	**5**
Jurisdictional issues subtotal	**44**	**3**	**103**	**6**	**77**	**4**	**77**	**3**	**48**	**2**	**70**	**2**
TOTAL	**1579**		**1807**		**2153**		**2201**		**2337**		**3598**	

* **NOTE:** This category represents cases that had been started at the Tribunal by 31-Dec-96, but had not been classified for appeal type by the time of this report writing. These cases are treated as missing for purposes of the percentage calculations.

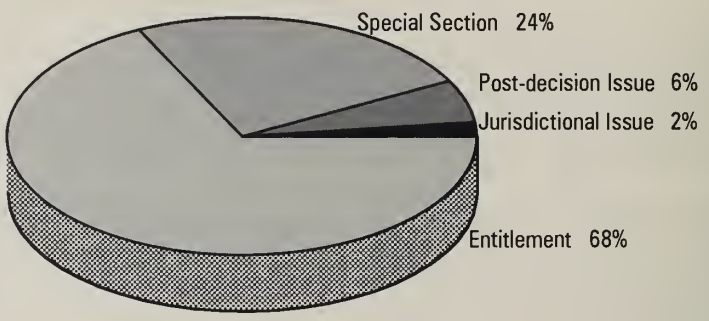
** **NOTE:** This category represents appeals related to the non-economic loss and future economic loss pension criteria introduced by Bill 162.

*** **NOTE:** This category represents appeals related to the increased Vocational Rehabilitation requirements introduced by Bill 162.

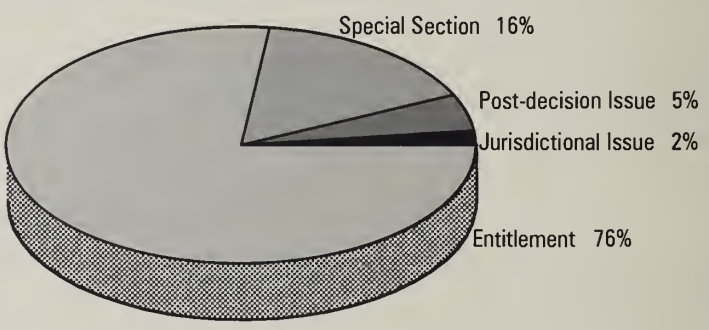
CHART 1

Incoming Cases by Category

Cases Received in 1995



Cases Received in 1996



Post-decision issues include reconsideration application, Ombudsman's inquires and judicial review cases. Entitlement includes pension issues, NEL and FEL appeals, employer appeals, reinstatement issues and vocational rehabilitation appeals.

TABLE 2

Annual Breakdown of Cases Closed

	1991		1992		1993		1994		1995		1996	
	No.	(%)	No	(%)	No.	(%)	No.	(%)	No.	(%)	No.	(%)
Leave	55	3	29	2	31	2	15	1	15	1	15	1
Right to Sue	108	6	113	7	101	5	84	5	57	3	49	2
Medical Exam	66	4	70	4	54	3	40	2	29	1	26	1
Access	313	18	389	23	522	28	499	28	474	22	469	19
Special Section subtotal	**542**	31	**601**	36	**708**	38	**638**	36	**575**	27	**559**	22
Pension	172	10	50	3	63	3	49	3	54	3	28	1
N.E.L./F.E.L. *	0	0	1	0	3	0	12	1	32	1	58	2
Commutation	10	1	10	1	26	1	34	2	29	1	41	2
Employer Assessment	22	1	24	1	18	1	22	1	41	2	85	3
Entitlement	792	45	729	44	794	43	766	43	1111	52	1307	52
Reinstatement	4	0	31	2	34	2	28	2	57	3	56	2
Vocational Rehabilitation **	0	0	5	0	25	1	52	3	65	3	83	3
Entitlement-related subtotal	**1000**	56	**850**	51	**963**	52	**963**	54	**1389**	65	**1658**	66
Judicial Review	8	0		0	15	1	3	0	7	0	6	0
Ombudsman Review	112	6	53	3	42	2	42	2	42	2	52	2
Reconsideration	76	4	67	4	61	3	63	4	85	4	126	5
Post-decision subtotal	**196**	11	**124**	7	**118**	6	**108**	6	**134**	6	**184**	7
Jurisdictional issue subtotal	**38**	2	**89**	5	**76**	4	**83**	5	**43**	2	**111**	4
TOTAL	**1776**		**1664**		**1865**		**1792**		**2141**		**2512**	

* **NOTE:** This category represents appeals related to the non-economic loss and future economic loss pension criteria introduced by Bill 162.

** **NOTE:** This category represents appeals related to the increased Vocational Rehabilitation requirements introduced by Bill 162.

TABLE 3

Case Closing Dispositions

1995	Jurisdictional issue (%)	Entitlement related (%)	Special section (%)	Post decision (%)	ALL CASES (%)
Pre-hearing dispositions					
Withdrawal	14	16	75	1	31
Abandonment	19	14	0	0	9
No Jurisdiction	63	1	0	0	2
Other (miscellaneous)	2	1	3	47	5
Subtotal	98	32	78	48	47
Post-hearing dispositions					
Subtotal	2	69	21	51	53
1996					
Pre-hearing dispositions					
Withdrawal	1	18	78	2	30
Abandonment	28	7	1	17	7
No Jurisdiction	27	3	0	0	3
Other (miscellaneous)	44	3	6	29	7
Subtotal	100	31	85	48	47
Post-hearing dispositions					
Subtotal	0	69	15	52	53

CHART 2

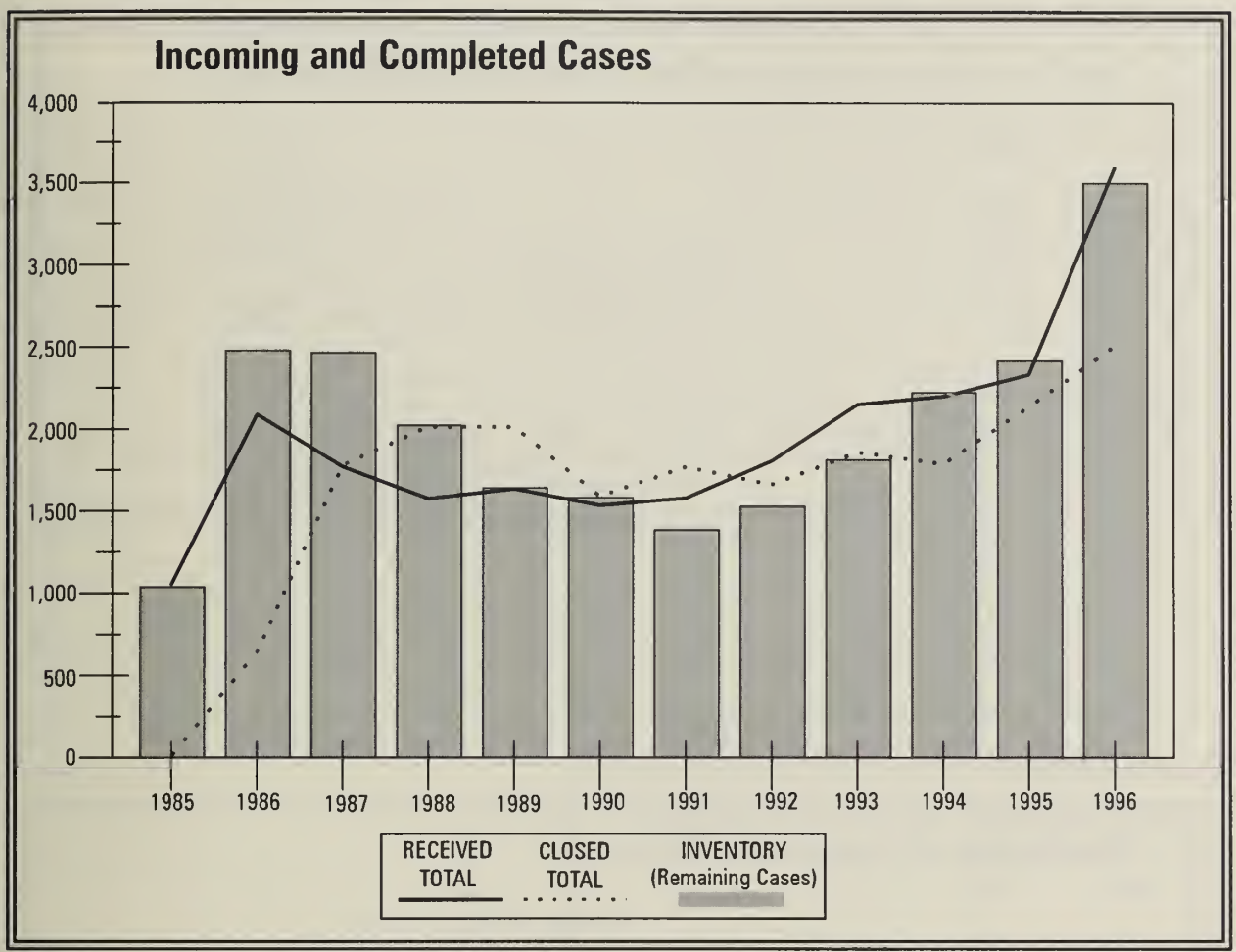

Incoming and Completed Cases
4,000
3,500
3,000
2,500
2,000
1,500
1,000
500
0
1985
1986
1987
1988
1989
1990
1991
1992
1993
1994
1995
1996
RECEIVED TOTAL
CLOSED TOTAL
INVENTORY (Remaining Cases)

TABLE 4

Aging Analysis for Closed Cases

	Closed in 1995 (median)	Closed in 1996 (median)
Medical Exam and Access	72	71
Right to Sue and Entitlement-related	399	423
Post-decision Issues	229	236
Jurisdictional Issues	41	96
All Cases	290	334

Note: The age represents the total number of calendar days between the receipt of the appeal and the closing of the file.

TABLE 5

Distribution of Completion Times

	Percentage of Cases Completed							
	Within 6 Months		6 to 12 Months		12 to 18 Months		More than 18 Months	
	1995	1996	1995	1996	1995	1996	1995	1996
Medical Exam and Access	91	89	7	6	2	1	1	4
Right to sue and Entitlement*	23	18	23	22	21	26	33	34
Post-decision Issues	42	36	31	37	13	13	14	14
Jurisdictional Issues	98	60	2	3	0	0	0	37
ALL CASES	41	35	19	19	16	19	24	27

* **Note:** The "right to sue and entitlement" category also includes leave applications, reinstatement appeals, vocational rehabilitation issues, employer assessment appeals, pension and wage loss appeals and pension commutation issues.

TABLE 6

Scheduling, Hearings and Decisions

	1992	1993	1994	1995	1996
Scheduling Dates Arranged*	1397	1580	1697	1591	2032
Hearings Conducted	1231	1239	1415	1332	1563
Cases Heard	1076	1120	1299	1223	1449
Decisions Issued	1074	907	1031	1403	1460
Cases Disposed by Decision	920	839	862	1148	1302

* **Note**: Due to the inevitability of a small portion of pre-hearing adjournments, it is necessary each year to arrange more hearings than actually take place. In 1996, the number of scheduling dates exceeded the number of hearings by a larger factor than usual. However, this was not due to an unusually high rate of pre-hearing adjournment. Instead, it was the result of a tendency to set the dates further into the future than had been typical in prior years.

TABLE 7

Decisions Issued by Decision Type

	1995	1996
Interim	191	187
Final	1127	1175
Reconsideration	85	98
TOTAL	**1403**	**1460**

TABLE 8

Tribunal Hearings Representation Profile

	Eastern (%)	Northern (%)	Southern (%)	Toronto (%)	TOTAL (%)
EMPLOYER REPRESENTATION					
Company Personnel	51	60	41	41	44
Consultant	7	10	13	19	17
Lawyer	15	9	11	16	14
Office of the Employer Adviser	15	12	18	9	11
None	12	9	18	15	14

	Eastern (%)	Northern (%)	Southern (%)	Toronto (%)	TOTAL (%)
WORKER REPRESENTATION					
Consultant	9	17	21	31	27
Lawyer or legal aid/asst.	39	9	33	24	23
Office of the Worker Adviser	23	47	20	19	24
Other	7	2	4	3	3
Union	9	20	19	12	14
None	14	5	2	11	9

Notes:

1) The representation is given for cases that received decisions in 1996.
2) The Eastern region is represented by cases heard in Ottawa, the Northern region by cases heard in Sault Ste. Marie,Sudbury, Timmins and Thunder Bay, and the Southern region by cases heard in London and Windsor. The Toronto region includes cases heard in Toronto, Hamilton, Burlington and Kitchener.

TABLE 9

Workers' Compensation Appeals Tribunal
1995 Statement of Expenditures and Variances
as at December 31, 1995 (In $000's)

	1995 Budget	1995 Actual	Variance $	Variance %
Salaries & Wages	8,260.0	6,714.0	1,546.0	18.72
Employee Benefits	1,445.0	1,182.0	263.0	18.20
Transportation & Communication	501.0	498.0	3.0	.60
Services	3,386.0	3,229.0	157.0	4.64
Supplies & Equipment	275.0	229.0	46.0	16.73
TOTAL OPERATING EXPENDITURES	**13,867.0**	**11,852.0**	**2,015.0**	**14.53**
Capital Expenditures	98.0	82.0	16.0	16.33
Social Contract Commitment	158.0	328.0	(170.0)	(107.59)
TOTAL EXPENDITURES	**14,123.0**	**12,262.0**	**1,861.0**	**13.18**

TABLE 10

Workers' Compensation Appeals Tribunal
1996 Statement of Expenditures and Variances
as at December 31, 1996 (In $000's)

	1996 Budget	1996 Actual	Variance $	Variance %
Salaries & Wages	8,260.0	6,797.0	1,463.0	17.71
Employee Benefits	1,445.0	1,131.0	314.0	21.73
Transportation & Communication	501.0	506.0	(5.0)	(1.00)
Services	3,386.0	2,964.0	422.0	12.46
Supplies & Equipment	275.0	195.0	80.0	29.09
TOTAL OPERATING EXPENDITURES	**13,867.0**	**11,593.0**	**2,274.0**	**16.40**
Capital Expenditures	98.0	46.0	52.0	53.06
Social Contract Commitment	158.0	82.0	76.0	48.10
TOTAL EXPENDITURES	**14,123.0**	**11,721.0**	**2,402.0**	**17.01**

TABLE 11

Public Sector Salary Disclosure Act
Employees paid $100,000 or more in 1995

Name	Position	Salary Paid	Taxable Benefits
S. Ronald Ellis	WCAT Chair	$107,660.84	$320.34
Marvin Goldstein	Publications Counsel	$104,413.28	$301.06
Zeynep Onen	WCAT Alternate Chair	$101,581.14	$299.86
Eleanor Smith	General Counsel	$117,655.41	$345.98
Carole A. Trethewey	Counsel to Chair	$119,388.79	$345.98

Prepared under the *Public Sector Salary Disclosure Act, 1996*.

TABLE 12

The Public Sector Salary Disclosure Act for the Calender Year Ending December 31, 1996
Employees paid $100,000 or more in 1996

Name	Position	Salary Paid	Taxable Benefits
Ellis, S. Ronald	WCAT Chair	$110,035.00	$318.00
Goldstein, Marvin	Publications Counsel	$104,412.00	$299.00
Prest, Carole	Counsel to Chair	$120,533.00	$343.00
Smith, Eleanor	General Counsel	$119,960.00	$343.00

I certify that the information provided on this form is correct in accordance with the *Public Sector Salary Disclosure Act, 1996*.

Peter Taylor, Manager, Finance, March 4, 1997

Appendix A

DECISION RELEASE POLICY

Preface

The Tribunal provides a final level of appeal for cases involving difficult, complex and frequently contentious issues. These include, for example, contested credibility issues, industrial disease issues, the multiple issues in vocational rehabilitation matters, return-to-work issues under s. 54, multiple-factor causation issues (often with conflicting medical evidence), Future Economic Loss (FEL) determination issues, assessment issues, interpretation and other legal issues, and chronic stress issues. The resolution of such issues commonly involves serious consequences for one or more of the parties and, often, for the system itself. The Act requires that the Tribunal provide written reasons for its decisions.

The Tribunal's tripartite decision-making process involves a panel chair, a member representative of workers and a member representative of employers. The process is designed to give to decisions the care and attention appropriate to a final level of appeal.

The time reasonably required to come to the point of releasing a decision varies significantly from case to case, but not uncommonly extends to several months. Experience demonstrates that it is impossible to predict how long any particular decision-making process will take. Even what may seem to be a straightforward case will sometimes prove difficult to resolve and take longer than expected to complete. There must, however, be a limit. The Tribunal has decided to draw a line at six months from the point where the hearing process - including any post-hearing investigations or submissions - is complete and the decision is finally ready to be made.

The Policy

1. All decisions will be released as soon as is practicable, but, in any event, effective September 1, 1995, no decisions will be outstanding more than six months following the completion of the hearing process and any post-hearing investigations or submissions.

2. There may be exceptional circumstances in a particular case which require an exemption from this time limit. Such exemptions can only be authorized by the Tribunal's Alternate Chair or Chair after a discussion with the panel. In such event, the parties and the WCB will be advised of the exemption, of the reasons for it, and of the planned release date.

Background and Explanation

The Reasons for Reasons

The written reasons for the Tribunal's decisions serve many diverse purposes. They provide an explanation to the parties - and particularly the "losing" party - of how and why this decision and not some other decision was made. They give directions to the WCB for implementing the decision. They allow the WCB, its Board of Directors and other stakeholders to understand the Tribunal's justification for overruling or supporting the WCB's decisions. They make meaningful reviews of decisions - by the Tribunal itself (pursuant to its reconsideration powers), by the WCB Board of Directors pursuant to its Section 93 powers, or by the Ombudsman or the Divisional Court - possible. They help parties and their representatives in future similar cases to understand the issues and evidence requirements in their cases. Consistency in decision-making depends on them, and they are the means through which that consistency may be evaluated by the Tribunal and by the parties and other interests. In respect of new matters of particular complexity, they are the means through which the Tribunal develops its own understanding of the issues. Reasoned decisions at the final level of appeal also contribute importantly to the information base for future WCB or Legislative policy initiatives.

To serve these many important purposes, Tribunal decisions must be fully reasoned and must meet high standards of decision quality.

Thus, the preparation of the Tribunal's decisions typically requires significant time, effort and attention.

The Purpose of the Decision Release Policy

While it regards the quality of its decisions to be of paramount importance, the Tribunal is also committed to the timely release of decisions. Decisions must serve the many purposes outlined above, but they must also provide an answer to the parties' questions within a reasonable time.

During 1994, in too many cases, the Tribunal proved unable to meet that time commitment. After consulations with its panel chairs and members, the Tribunal has, therefore, decided to publish this policy specifying a decision release-time standard which the panel chairs and members have agreed is reasonable and practicable.

The policy is intended to provide a standard of institutional expectations for the guidance of panel chairs and members. The policy will also provide parties with the means of assessing the reasonableness of their own expectations concerning the timing of the release of a decision, and of holding the Tribunal accountable.

The Decision-making Process

Tribunal decisions are made by tripartite panels in a post-hearing process that is inescapably complex.

The process consists of the following elements: caucus discussions, often intensive, amongst the three panel members; the writing of a fully reasoned draft decision by the panel chair; review of that draft by each of the panel members (and, at a panel chair's or member's option, in the Tribunal's draft-decision review process); finalization of the draft by the panel chair; and, finally, the acceptance of the final draft by all three members of the panel (or by a majority only, followed by the writing of a reasoned dissent).

In cases in which consensus is not easily reached, this process, or parts of it, may be repeated more than once before a decision is finally accepted by the panel or by a majority of the panel.

Once a final draft has been approved and any dissent has been written, the decision is then released in official form by the Tribunal.

This decision-making process occurs in a highly active environment. Over the course of a year, each full-time panel chair will typically be involved in a large number of decision-making processes, potentially 100 or more, with perhaps 20 or 30 of them in the ready-to-write status at any one time. The panel chair will be working with varying combinations of worker and employer panel members, each of whom will be involved at the same time with other combinations of members and panel chairs in identical processes in a large number of other cases. Panel members will be involved in approximately 200 such processes in the course of a year, with perhaps 40 or 50 of these active at any one time.

The logistics of this environment are, of course, further complicated by the fact that all of the decision-makers are also regularly involved in the hearing of new cases with differently constituted panels and are frequently assigned to out-of-Toronto hearings.

In an increasingly high proportion of cases (currently about one-third), at some stage in the decision-making process – hopefully at an early stage – a panel will conclude that before it can be satisfied as to the "real merits and justice" of the case at hand it needs more or better evidence – typically more medical evidence – or more submissions. At that point, the panel will order further investigations or request submissions, and will put the decision-making on hold until those post-hearing processes are completed.

Recent Problems in Releasing Timely Decisions

Since 1992, as the average complexity of the cases has increased and the new issues presented by the 1989 amendments to the Act have begun to appear at the Tribunal, the burden of the decision-writing, particularly for the full-time panel chairs, has steadily increased. The extent of this development and its

implications were not fully realized until 1994, with the emergence of decision-writing backlogs and significant delays in the completion of a number of these decision-making processes.

These delays have not only arisen in difficult or complex cases, but have also appeared in a number of straightforward cases, as, contrary to what might be expected, in a backlog situation even straightforward cases may be delayed. This happens because when panel chairs begin struggling with a decision-writing backlog, they are soon faced with choosing which of the cases they should work on. If they devote themselves to making sure the newly heard, straightforward cases are completed in a timely fashion, then their already-delayed, difficult or complex decisions fall further behind. If they work on the delayed cases, the new straightforward cases fall into the backlog. The panel chairs sometimes make one choice and sometimes the other, and the result is that even straightforward cases suffer unexpected delays.

The 1995 Decision-backlog Retrieval Strategy

The scheduling formula for the full-time panel chairs is being changed to reflect this greater need for writing time, and the Tribunal is currently involved in an extraordinary effort to eliminate these backlogs. Many panel chairs are participating in extended periods of writing, without taking on new hearing assignments. In the short run, this will lead to some further delays in the time it takes cases to get to a hearing. However, with a few exceptions, by June 30, 1995, there will no longer be any decisions outstanding in excess of 12 months, and by September 1, 1995, there will be no decisions outstanding in excess of six months.

After that, this new decision release policy will apply.

S.R. Ellis,

Tribunal Chair

Appendix B

MINISTRY OF LABOUR CROSS-APPOINTMENT PILOT PROJECT

Report to the Minister of Labour

(i) Introduction

In September 1993, a pilot project began as a result of a joint initiative on the part of the Ministry of Labour, the Office of Adjudication, the Pay Equity Hearings Tribunal, and the Workers' Compensation Appeals Tribunal. The purpose of the project was to evaluate the utility and effectiveness of cross-appointments of adjudicators between adjudicative agencies.

Terms of Reference for the pilot project were developed among the three agencies and forwarded to the Minister of Labour. Representatives of each of the respective agencies were nominated for part-time Order-in-Council cross-appointments to the other participating agencies. Each of the nominees was interviewed by the "away" agency on the understanding that the away agency could veto any nominee it considered to be unsuitable. As it happened, all selected nominees were approved by the away agency.

The cross-appointments were granted for three year terms, to expire in September 1996. Initially the pilot project was to run from September 1993 to September 1995, but was extended for one additional year to match the length of the OIC appointments.

As a result, one representative of each agency was appointed to each of the other two agencies. Each "home" agency lost, therefore, a portion of the services of two of their own appointees. In return, each agency had available the services of two appointees from the other two agencies. The intent was to ensure reasonably equal provision of services. As will be seen below, this objective was not achieved in all respects.

The participants underwent training sessions at their "away" agencies. The content of the training programs was left to the discretion of the away agencies.

It should be noted that the Terms of Reference discuss cross-appointment of an entire panel between the Pay Equity Hearing Tribunal and the Workers' Compensation Appeals Tribunal. It was subsequently decided to limit the cross-appointment between those two agencies to an exchange of Vice-Chairs. Hence, all participants in the cross-appointment project were Vice-Chairs at their home agencies.

The pilot project was shepherded by a steering committee comprised of a senior representative of each of the participating agencies, and the registrars of those agencies. The steering committee met on a regular basis to address problems or questions arising during the course of the project.

(ii) The Terms of Reference for the cross-appointment pilot project

The Terms of Reference for the project were developed by the steering committee, in consultation with the chairs of the three participating agencies (Appendix A).* The Terms of Reference defined the participants in the project and stipulated that time commitments by participants should be structured to ensure some degree of equity consistent with the particular scheduling needs of each agency. Scheduling was left to be determined by the registrars of the respective agencies, as though the cross-appointed member was a part-time member of the away agency. Scheduling problems were to be referred to the steering committee for resolution. The Terms of Reference confirmed that salary costs for each cross-appointee would be paid by the home agency, subject to payment of expenses by the away agency.

Support services, supervision, and confidentiality requirements were to be imposed on the cross-appointees as though the cross-appointees were part-time members of the away agency.

(iii) Critique of the project

The six participants in the project wrote reports recording their experience.* A number of connected themes are to be found in those reports.

Most importantly, all of the participants were satisfied that the transition from one agency to another agency was less difficult than they anticipated. The participants generally found that the principal tool for successful integration into the away agency was experience as an adjudicator. The participants found that the differences in the governing legislation did not present a substantial obstacle to integration. Procedural differences among the tribunals proved to be somewhat more difficult to absorb, and comments regarding training suggested that greater emphasis be placed on identifying procedural idiosyncrasies among the various agencies.

Another consistent theme in the participants' comments was the sense that participation at the limited levels specified for the pilot project did not allow the participants to become sufficiently familiar with the environment of the away agency. The participants seemed to feel that a more in-depth involvement would be beneficial to the cross-appointment process.

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* These documents were included in the Report to the Minister, but are not included in the Annual Report.

Finally, there seemed to be some consistent concern with the effect of administrative differences among the three participating agencies and the impact that this had on the participants. It was noted, in particular, that the scheduling requirements of the Pay Equity Hearing Tribunal were fundamentally inconsistent with the scheduling processes of the other two agencies. This caused substantial difficulties and inequities in the scheduling of the various participants. One participant in particular had virtually no hearing activity during the course of her cross-appointment to the Pay Equity Hearing Tribunal.

A final concern that arose out of the project was something only partially anticipated in the Terms of Reference. During the life of the project, one of the participants left her position at the home agency and moved to another agency that was not a participant in this project. Fortunately, this individual was in a position to continue to offer her services to the away agency, but did so at the sufferance of her new home agency. Had this individual not been able to continue her participation, her away agency would have lost her services while continuing to be obligated, at least in principle, to permit its nominee to continue to provide service to the corresponding away agency.

These concerns aside, it seems that the consensus among the cross-appointees who were able to participate in another agency in a meaningful way was that the experience was extremely beneficial to them. They felt that working with another agency significantly expanded their adjudicative skills by introducing them to new legislation and a different adjudicative milieu. The participants suggested, in their comments, that the experience gave them a more diversified background as an adjudicator, and increased their confidence in their ability to move easily to another adjudicative situation.

(iv) Recommendations for future implementation

It is the unanimous recommendation of the participating agencies in this project that the project be extended for a further two year period. As we see it, the project could continue in one of two ways.

Obviously, it could be continued in its present format. The advantage of doing so is that the participating agencies are now familiar with the logistics of the arrangement and better able to take advantage of the scheduling flexibility that the project can offer. That flexibility can be enhanced particularly if the participating agencies are prepared to accept that there will not always be an equal exchange of time.

On the other hand, the concerns of the participants outlined above could be addressed by revising the project. Noting that the principal problems that became apparent during this project involved the difficulty of scheduling part-time appointees, and the lack of an opportunity on the part of those appointees to participate fully in the "life" of the other agency, it appears that the best solution is to make the cross-appointment more substantial. The most effective way of achieving that would seem to be by way of secondment from one agency to another. The benefit of doing so is that it would enable each cross-appointee to become a full-time member of the away agency for a set

period of time. Such an arrangement would also enable the away agency to schedule the cross-appointee as though the person were a full-time member of that agency. It would also enable the participants to become fully familiar with the law and practice applied by the away agency. It may well be of interest to the government to adopt this suggestion if it is considering moving towards a more integrated system for administrative agencies.

If this approach were adopted, we envision that the seconded individuals would be paid by the away agency, rather than the home agency. This would tie the financial obligation of each of the agencies more directly to the service provided. Under the present system, when one of the participants changed jobs, his/her original home agency was no longer in a position to comply with the terms of the pilot project. Assigning responsibility for payment to the away agency would alleviate that problem.

We also recommend that participants in the cross-appointment project not be given a supplementary OIC appointment to accommodate the cross-appointment. It seems to us that it is simpler and easier to adjust an existing OIC appointment by including, as part of that existing appointment, the right to provide services to the away agency. The expanded appointment could be made for the duration of the appointee's existing appointment.

Consequently, we are recommending that the program be extended for two years. We recommend that consideration be given to revising the project so that, during each of the years of that two-year period, the participating agencies second one Vice-Chair to each of the other agencies for a one-year period. If this approach is adopted, the away agency would be designated as the body responsible for remunerating the OIC appointee.

Alternatively, we recommend continuing the project in its present format for an additional two years. If this approach is adopted, the home agency would be designated as the body responsible for remunerating the OIC appointee.

In either case, we recommend that the participants be given expanded OIC appointments that permitted participation in both the home and away agencies.

The underlying purpose of this project was to test the proposition that adjudicators are capable of moving from one legislative realm to another with relative ease. Noting the apparent confirmation of that hypothesis by the experience to date, it appears that intensification of the immersion in another agency would facilitate the integration of provincial adjudicators.

It probably goes without saying that segmentation of adjudication increases costs. The greater the integration of adjudicators in related fields, the easier it is to administer, finance, train, etc., those adjudicators. The experience to date would also suggest that it may result in a better adjudicator.

In summary, we see three compelling reasons for continuing the pilot project involving the three agencies in question:

1. it provides significant experience benefits to the participants;

2. it provides a method for assessing the viability of developing a streamlined, integrated adjudicative model within the Labour Ministry;

3. it accomplishes these ends at no cost to the Ministry.

In light of those benefits, we recommend the extension of the cross-appointment pilot project, in one of the formats outlined above, for a period of two years from September 1996 to September 1998.

Laura Bradbury
Chair, Office of Adjudication

Ron Ellis
Chair, Workers' Compensation Appeals Tribunal

Phyllis Gordon
Chair, Pay Equity Hearings Tribunal

26/07/96

Appendix C

PRACTICE DIRECTION: FEES AND EXPENSES

General

Under sections 74(c) and 92 of the *Workers' Compensation Act*, the Tribunal may refund certain expenses related to a worker's attendance at a hearing. The Tribunal may also pay certain expenses of a worker's witnesses, where their expenses are not already paid by their employer. Section 74(c) does not provide for payment of expenses to employers or their witnesses.

Anyone who wants to claim for expenses must complete a "Hearing Expense Claim". These forms are available at the reception desk at the Tribunal's Toronto office, or from the Panel at a regional hearing.

Maximum rates for specific expenses are set from time to time. Current rates are printed on the Hearing Expense Claim. Some expense claims must be supported by a receipt.

This Practice Direction does not apply to applications under section 17 of the *Workers' Compensation Act*.

Witness Fees

The Tribunal will pay workers, and their witnesses, witness fees if they have lost wages to attend a hearing. This payment is subject to a daily maximum.

If you have received a summons, any money already sent with the summons will be deducted from the amount to be paid for lost wages.

Out-of-Pocket Expenses for Hearings

The Tribunal holds hearings in a number of cities throughout Ontario. **Only a worker or witness who lives outside the metropolitan area where the hearing takes place, may claim the following out-of-pocket expenses.**

- Meals – up to a daily and per meal maximum.
- Parking – if you drive and have a receipt, you receive up to a daily maximum. Without a receipt, you receive a minimum flat rate.
- Travel – Train or inter-city bus fare is paid with a receipt. If you drive, car mileage is paid based on a set rate.

For out-of-province travel, expenses are generally only paid from Winnipeg in the west and Montreal in the east. For example, if you are coming from British Columbia to Toronto, you are only paid travel expenses from Winnipeg to Toronto. Exceptional circumstances may be dealt with by a Panel.

The Tribunal's Scheduling Department may help people travelling long distances to arrange transportation and accommodation.

Reasonable costs for hotel accommodation may be approved by the Scheduling Department for workers and their witnesses based on the following considerations:

- travel of more than 200 kilometres, one way;
- the time of the hearing; and
- weather conditions.

Advance Payments

The Tribunal may make payments to a worker before a hearing in exceptional circumstances. Requests may be made to the Scheduling Co-ordinator or to the Manager, Financial Administration.

Professional Witnesses

Fees for evidence obtained by the parties from professional witnesses are paid only if approved by the Panel. A Panel may approve payment where:

- a professional report is found to be significant in the decision-making process;

- oral evidence given by a professional witness has proved to be of exceptional importance to the decision-making process.

Where a Panel orders payment of a party's professional witness, payments are based on the Tribunal's approved schedule of rates.

Out-of-pocket Expenses to Attend a Medical Appointment

Where the Tribunal's Medical Liaison Office has arranged for a worker to be examined by a doctor, requests for payment of expenses should be directed to the Medical Liaison Office or to the Manager, Financial Administration. Payments are based on the same rates as for Hearing expenses.

Dated at Toronto, Ontario, this 5th day of February, 1997.
Workers' Compensation Appeals Tribunal
S.R. Ellis, Tribunal Chair

Appendix D

VICE-CHAIRS AND MEMBERS IN 1995 AND 1996

This is a list of Vice-Chairs and Members whose Order-in-Council appointments were active during the reporting period. The date given is the date of each appointee's first appointment in his or her current capacity. Individuals may have been active at the Tribunal under other appointments prior to the date indicated.

Full-time	Date of First Appointment
Chair	
Ellis, S. Ronald	October 1, 1985
Alternate Chair	
Zeynep Onen[1]	
Vice-Chairs	
Bigras, Jean Guy	December 17, 1987
Cook, Brian	September 6, 1991
Frazee, Catherine	September 3, 1992
McCombie, Nick	January 22, 1991
McIntosh-Janis, Faye	May 14, 1986
Moore, John	May 1, 1988
Onen, Zeynep	October 1, 1988
Sandomirsky, Janice	July 3, 1990
Signoroni, Antonio	October 1, 1985
Strachan, Ian	October 1, 1985
Members Representative of Workers	
Cook, Mary	November 1, 1990
Crocker, James	August 1, 1991
Jackson, Faith	November 1, 1990
Lebert, Raymond	June 1, 1988
Robillard, Maurice	March 11, 1987
Shartal, Sarah	November 1, 1990
Thompson, Patti	October 9, 1991

1 Zeynep Onen was the Alternate Chair from August 1993. She resigned from the position and returned to a full-time adjudicative role as a Vice-Chair in May 1996. The Alternate Chair position was still vacant at the end of the reporting period.

Members Representative of Employers

Apsey, Robert	December 11, 1985
Barbeau, Pauline	January 15, 1990
Chapman, Stanley	July 16, 1990
Copeland, Susan	April 6, 1994
Jago, W. Douglas	October 1, 1985
Meslin, Martin	August 1, 1988
Nipshagen, Gerry	June 15, 1989

Part-time

Vice-Chairs

Alexander, Judith	January 31, 1996
Coke, Robert	December 7, 1994
Cummings, Mary Ellen	June 8, 1994
Farrer, Jennifer Bradley	January 31, 1996
Faubert, Marsha	December 10, 1987
Flanagan, Willliam	June 1, 1991
Harris, Daniel	April 15, 1991
Hartman, Ruth	December 11, 1985
Keil, Martha	February 16, 1994
Kenny, Maureen	July 29, 1996
Libman, Peter	February 14, 1996
Marafioti, Victor	March 11, 1987
McGrath, Joy	December 10, 1987
Mole, Ellen	January 31, 1996
Newman, Elaine	March 16, 1995
Renault, Audrey	January 31, 1996
Robeson, Virginia	March 15, 1990
Singh, Vara [2]	June 1, 1991
Stewart, Susan	May 14, 1986
Sutherland, Sara	September 6, 1991
Wacyk, Tanja	June 8, 1994

Members Representative of Workers

Anderson, James	May 4, 1995
Beattie, David	December 11, 1985
Besner, Diane	January 13, 1995
Felice, Douglas	May 14, 1986
Ferrari, Mary	May 14, 1986
Higson, Roy	December 11, 1985
Klym, Peter	May 14, 1986
Rao, Fortunato	February 11, 1988
Timms, David	May 4, 1995

2 Vara Singh passed away on April 11, 1995.

Members Representative of Employers

Donaldson, Joseph	August 4, 1994
Fay, Carole Ann	August 4, 1994
Howes, Gerald	August 1, 1989
Robb, C. James	June 2, 1993
Ronson, John	December 11, 1985
Séguin, Jacques	January 1, 1990
Shuel, Robert	August 1, 1989
Young, Barbara	February 17, 1995

VICE-CHAIRS AND MEMBERS – EXPIRED APPOINTMENTS AND RESIGNATIONS

The following is a list of Order-in-Council appointments who resigned or whose appointments expired during 1995 and 1996.

Hartman, Ruth
Stewart, Susan
Wacyk, Tanja

VICE-CHAIRS AND MEMBERS – REAPPOINTMENTS

Bigras, Jean Guy	December 17, 1996
Cook, Mary	November 1, 1996
Faubert, Marsha	December 10, 1996
Felice, Douglas	May 14, 1995
Ferrari, Mary	May 14, 1995
Howes, Gerald	August 1, 1995
Jackson, Faith	November 1, 1996
Kenny, L. Maureen	July 29, 1996
Klym, Peter	May 14, 1995
McGrath, Joy	December 10, 1996
McIntosh-Janis, Faye	May 14, 1995
Newman, Elaine	March 16, 1995
Nipshagen, Gerry	June 15, 1995
Séguin, Jacques	July 1, 1995
Shartal, Sarah	November 1, 1996
Shuel, Robert	August 1, 1995

NEW APPOINTMENTS DURING 1995 AND 1996

Judith Alexander (Part-time Vice-Chair) January 1996

Ms. Alexander has a Ph.D. in economics, a university teaching career, and six years of adjudicative experience as a member of the Copyright Board of

Canada. She is bilingual and provides support to our capacity of holding hearings in the French language. She resides in Ottawa and brings an out-of-Toronto perspective to the Tribunal's work.

James Anderson
(Part-time Member Representative of Workers) May 1995

Mr. Anderson was previously the Director of the Ontario Region of the Canadian Union of Public Employees where his responsibilities included the administration and coordination of CUPE activities throughout Ontario.

Diane Besner
(Part-time Member Representative of Workers) January 1995

Ms. Besner is a regional representative in the Ottawa office of the Workers' Health and Safety Centre, where her duties include being a liaison representative for several unions and organizing and coordinating the delivery of WHSC training and information services to unions. She is fully bilingual.

Jennifer Bradley Farrer
(Part-time Vice-Chair) January 1996

Ms. Farrer is a lawyer, called to the bar in 1981, who came to the Tribunal with six years of experience as a personal injury lawyer with a Toronto law firm. Her legal experience in the personal injury field is, of course, of direct relevance to the work of the Tribunal.

Peter Libman
(Part-time Vice-Chair) February 1996

Mr. Libman is a lawyer, called to the bar in 1974, who earned an LL.M. degree from Osgoode Hall Law School in 1990. He was counsel to the Morand Commission in 1975, and was closely associated with the Landlord's Self Help Centre for a number of years. He was an adjudicator with the Rent Review Hearings Board from 1992, until it was disbanded.

Ellen Mole
(Part-time Vice-Chair) January 1996

Ms. Mole was called to the bar in 1983. She has substantial experience in the employment law field, including three years of experience as an arbitrator and mediator. She is also the author of a number of well-known publications on wrongful dismissal.

Audrey Renault
(Part-time Vice-Chair) January 1996

Ms. Renault is a bilingual resident of Ottawa who was a Vice-Chair at the Social Assistance Review Board from 1988 to 1994, where her work often involved the adjudication of disability claims. Prior to this, she was a community legal worker in Ottawa. She provides reinforcement for our bilingual services.

David Timms
(Part-time Member Representative of Workers) May 1995

Mr. Timms was employed at Stelco Inc., for over 30 years. He was a union representative where his duties included representing injured workers in their compensation claims.

Barbara Young
(Part-time Member Representative of Employers) February 1995

Ms. Young has been an Occupational Health and Safety Nurse with several companies and has 10 years in-plant experience in health and safety and workers' compensation matters from a management perspective.

SENIOR STAFF

The following is a list of the senior staff who were employed at the Tribunal during the reporting period.

Linda Moskovits	Chief Information Officer
Beverley Pavuls	Chief Administration Officer
Carole Prest	Counsel to the Tribunal Chair
Eleanor Smith	Tribunal General Counsel
Peter Taylor	Manager, Financial Administration

MEDICAL COUNSELLORS

The following is a list of the Tribunal's Medical Counsellors.

Dr. John D. Atcheson	Psychiatry
Dr. Douglas P. Bryce	Otolaryngology
Dr. Ross Fleming	Neurosurgery
Dr. W. Robert Harris	Orthopaedic Surgery
Dr. Robert L. MacMillan	Internal Medicine
Dr. John S. Speakman	Ophthalmology
Dr. Neil Watters	General Surgery

Dr. John D. Atcheson joined the Tribunal as a Counsellor on Psychiatry effective January 1, 1995. He replaced Dr. Fred Lowy, who left to pursue a sabbatical abroad.

Appendix E

WORKERS' COMPENSATION APPEALS TRIBUNAL

REPORT AND FINANCIAL STATEMENTS
December 31, 1995

Auditors' Report

To the Workers' Compensation Appeals Tribunal

We have audited the balance sheet of the Workers' Compensation Appeals Tribunal as at December 31, 1995 and the statements of recoverable expenditures and Workers' Compensation Board funding for the year then ended. These financial statements are the responsibility of the Tribunal's management. Our responsibility is to express an opinion on these financial statements based on our audit.

We conducted our audit in accordance with generally accepted auditing standards. Those standards require that we plan and perform an audit to obtain reasonable assurance whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation.

In our opinion, these financial statements present fairly, in all material respects, the financial position of the Workers' Compensation Appeals Tribunal as at December 31, 1995 and the results of its operations and Workers' Compensation Board funding for the year then ended in accordance with the accounting policies described in Note 2 of the financial statements.

Deloitte & Touche
Chartered Accountants
Toronto, Ontario
May 24, 1996

BALANCE SHEET
December 31, 1995

	1995	1994
ASSETS		
Cash	$ 646,500	$ -
Receivable from Workers' Compensation Board	2,050,500	3,051,300
Salaries and wages recoverable (Note 3)	154,000	114,400
Advances	11,000	22,600
	$2,862,000	$3,188,300
LIABILITIES		
Bank indebtedness	$ -	$ 362,900
Accounts payable and accrued liabilities	1,462,000	1,425,400
Operating advance from Workers'Compensation Board (Note 4)	1,400,000	1,400,000
	$2,862,000	$3,188,300

Approved on behalf of the Workers' Compensation Appeals Tribunal
S.R. Ellis, Chairman

STATEMENT OF RECOVERABLE EXPENDITURES
Year ended December 31, 1995

	1995	1994
Salaries and wages	$ 6,757,300	$ 6,417,400
Employee benefits	1,182,000	1,086,300
Transportation and communication	497,600	395,800
Services	3,228,900	2,891,100
Supplies and equipment	229,300	252,600
Social contract commitment	327,700	327,700
Total operating expenditures	12,222,800	11,370,900
Capital expenditures	81,600	39,600
Total recoverable expenditures	$12,304,400	$11,410,500

STATEMENT OF WORKERS' COMPENSATION BOARD FUNDING
Year ended December 31, 1995

	1995	1994
Recoverable expenditures	$12,304,400	$11,410,500
Reimbursement from Workers' Compensation Board	13,305,200	11,012,300
Change in receivable from Workers' Compensation Board	(1,000,800)	398,200
Receivable from Workers' Compensation Board, beginning of year	3,051,300	2,653,100
Receivable from Workers' Compensation Board, end of year	$ 2,050,500	$ 3,051,300

NOTES TO THE FINANCIAL STATEMENTS
December 31, 1995

1. General

The Workers' Compensation Appeals Tribunal ("Tribunal") was created by the Workers' Compensation Amendment Act. S.O. 1984, Chapter 58 - Section 32, which came into force on October 1, 1985.

The purpose of the Tribunal is to hear, determine and dispose of in a fair, impartial and independent manner, appeals by workers and employers of decisions, orders or rulings of the Workers' Compensation Board, and any matters or issues expressly conferred upon the Tribunal by the Act.

2. Significant Accounting Policies

The Tribunal's financial statements are prepared in accordance with generally accepted accounting principles except for capital expenditures which are charged to expense in the year of acquisition.

3. Salaries and Wages Recoverable

Certain employees are on secondment with the Ministry of Community, Social Services of the Government of Ontario and the Society of Ontario Adjudicators and Regulators and their remuneration is recoverable.

4. Operating Advance from Workers' Compensation Board

The operating advance is interest-free with no specific terms of repayment.